Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NATHANIEL WHITE,
PETITIONER

V.

LLOYD BENTSEN, AS
SECRETARY OF THE U.S. DEPARTMENT
OF THE TREASURY,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NATHANIEL WHITE
PETITIONER - "PRO SE"
P.O. BOX 23201
CHICAGO, ILLINOIS 60623
(NO PHONE)

12 pp

QUESTION PRESENTED

Whether in a federal employment discrimination case based on race and/or sex, pursuant to 42 U.S.C. §2000e-16(c), principles of equity should be invoked, pursuant to 29 CFR §1613.233(c), to allow U.S. District Court to accept subject matter jurisdiction of plaintiff's case due to defendant's actions of alleged affirmative misconduct of deception, misrepresentation, and concealment of material facts concerning evidence used in making the Final Agency Decision, pursuant to 29 CFR §1613.221(a),; whereas the defendant's alleged affirmative misconduct became known to plaintiff subsequent to expiration of his twenty-day administrative appeal time to the Equal Employment Opportunity Commission, per 29 CFR §1613.233(a).

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Nathaniel White, ("White" or "Petitioner") respectfully requests that a writ of certiorari issue and that the Supreme Court review the judgement of the U.S. Court of Appeals for the Seventh Circuit in this case, reversing and remanding it to the U.S. District Court of Northern Illinois, Eastern Division

allowing the court to accept subject matter jurisdiction for consideration of the merits of petitioner's complaint.

PUBLISHED OPINION

The Opinion of the U.S. Court of Appeals for the Seventh Circuit, published as White v. Bentsen, at 31 F.3d 474, is reprinted in Appendix A. Appendix B is a true copy of U.S. Court of Appeals Order affirming the U.S. District Court. Appendix C is a true copy of the Magistrate's Report & Recommendation to the District Court Judge. Appendix D is a true copy of the U.S. District Court Order dismissing the case. Appendix E is a true copy of U.S. Court of Appeals Order denying White's Petition for Rehearing with Suggestion for Rehearing En Banc.

JURISDICTION

The judgement of the Court of Appeals sought to be reviewed was entered July 29, 1994. Petitioner timely filed his Petition for Rehearing with Suggestion for Rehearing En Banc, which petition was denied September 8, 1994. This Court has discretionary jurisdiction over this cause by virtue of 28 U.S.C., §1254(1).

STATUTES AND CODE OF FEDERAL REGULATIONS INVOLVED

Civil Rights Act of 1964. 42 U.S.C. §2000e-16(b).

"(b) Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of

subsection (a) of this section through appropriate remedies, ... and shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. ... . The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions... ."

Code of Federal Regulations, 29 CFR-Labor -- Equal Employment Opportunity in the Federal Government - Part 1613. et seq., specifically 29 CFR §1613.218(h) "The hearing shall be recorded and transcribed verbatim."

STATEMENT OF THE CASE

This case was brought against the United States Department of the Treasury

pursuant to 42 U.S.C. §2000e-16(c) by one of its employees, Nathaniel White, claiming discrimination on the basis of race and/or sex for employment practices performed by the management of the U.S. Department of the Treasury/Internal Revenue Service ("Agency").

This case involves an issue of subject matter jurisdiction, for petitioner's complaint filed in U.S. District Court. Respondent, Secretary of the Treasury, states that U.S. District Court has no subject matter jurisdiction over petitioner's complaint due to petitioner filing late appeal to Equal Employment Opportunity Commission ("EEOC"). Petitioner states that circumstances beyond his control, (namely respondent's affirmative misconduct violating EEOC regulations

during the Agency's administrative processing of his complaint), prevented him from filing timely appeal to EEOC and that principles of equity should be invoked allowing the U.S. District Court to accept subject matter jurisdiction over his complaint.

The jurisdiction of the U.S. District Court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Act of 1991, 42 U.S.C. §2000e-16(c).

Jurisdiction was conferred upon the U.S. Court of Appeals for the Seventh Circuit by 42 U.S.C. §2000e-16(d), 42 U.S.C §2000e-5(j) and 28 U.S.C. §1291 & § 1292 as provided therein.

A. ADMINISTRATIVE PROCEEDINGS:

Nathaniel White, petitioner (Black/Male), GS-12 Internal Revenue

Agent, has been employed by Department of the Treasury Internal Revenue Service, Chicago District Examination Division, since June, 1975. On June 20, 1990, petitioner filed a formal complaint with the Equal Employment Opportunity Commission (EEOC), alleging employment discrimination based on "Sex (male) and/or Race (black)" for employment practices performed by his immediate supervisor, JinJa Omohundro (Korean/Female) GS-14 Manager, in the following areas:

1. Assignment of Duties: Insisting that petitioner perform duties, traveling away from home overnight, which is contrary to his job position description.

2. Duty Hours: Refusing to allow petitioner to work any extra hours in excess of the regular daily eight hours, credit hours, which was contrary to a union agreement, while allowing other employees to do so.

3. Evaluation- Appraisal: Evaluating petitioner twice without making any mention or allowing credit for previous extensive civil and criminal fraud experience and not reflecting his performance or potential, which was contrary to the Agency's Merit Promotion Plan filed with the Office of Personnel Management. Thus because of plaintiff's race and/or sex, defendant failed to promote plaintiff.

4. Harassment & Working Conditions:

Immediate supervisor's use of profane language (swearing) and hollering, along with other tactics creating a hostile work environment.

Petitioner stated that the above discriminatory practices limited him from having an equal opportunity of development in the commodity program and particularly in the large case referral program, adversely and unfairly affected his competitive status for promotion, demoralized him for the performance of his required duties as an Internal Revenue Agent such that he could not perform them in an outstanding manner as he previously had done.

(Reference: District Document Number ("DD") DD-1, Complaint ("CMPL") (filed

August 21, 1992 in U.S. District Court of Northern Illinois, Eastern Division), (See CMPL ¶5 for full details of the above allegations.)

During the period August 13, 1990 - September 19, 1990, the Agency's Regional Complaints Center (RCC), part of the Agency's EEOC Program in Chicago, conducted an investigation of White's formal complaint. On November 30, 1990, the RCC issued a Proposed Disposition Letter stating, "It has been determined that the allegation(s) raised are not supported by the evidence. Therefore, I recommend a finding of no discrimination." (See DD-1, CMPL Exh-C, pg 111.) On October 12, 1990, White wrote a six page response to the RCC requesting a supplemental or additional

investigation of the complaint for all the issue(s), as there were other relevant and material items of evidence and fact that should have been presented as part of the Report of Investigation (ROI) of the RCC. (DD-1, CMPL Exh-C, pg 124.) After the RCC failed to address the specifics of White's October 12, 1990 letter asking for full development of the facts pertaining to the issue(s), White wrote Honorable Cardiss Collins, his Congressional Representative, requesting her to obtain reason(s) why full development of the facts pertaining to the issue(s) of his complaint was not done. On March 6, 1991, Dorian Morley, Director of the RCC, responded stating,"A copy of Mr. White's letter was also added to the Report of Investigation on November 8, 1990 as

Exhibit 21, for consideration by a trier of fact, should Mr. White disagree with the center's proposed disposition." (DD-1,CMPL Exh-C, pg 133.) Due to the Agency's RCC not fully developing the facts for any of the issue(s) of White's formal complaint, an administrative law judge scheduled and held hearings on June 11 & 12, 1991. On November 6, 1991, the administrative law judge rendered a statement of findings and recommended decision of no discrimination which was based in part upon the erroneous transcript of the EEOC administrative hearing.

B. FACTS OF THE ADMINISTRATIVE PROCEEDINGS RELEVANT TO QUESTION PRESENTED FOR REVIEW:

The facts of this case as set forth on the face of White's CMPL that are

material and relevant to White filing late appeal to EEOC on April 8, 1992 with respect to 29 CFR §1613.233(a) and 29 CFR §1613.233(c) are as follows: (The facts are all supported with written correspondence. Petitioner sent all his correspondence via U.S. Postal Service, certified return receipt requested. These facts are taken verbatim from the DD-1, CMPL Exh-B, pgs 4 thru 7 and pg 10 and were presented to EEOC, U.S. District Court, and U.S. Court of Appeals. White "PRO SE" wrote on April 8, 1992 the following:)

1. FACTS UP TO TIME OF FINAL AGENCY DECISION:

A) On March 26, 1991, Mary A. Pappas, Administrative Judge, issued a letter of notice for hearing in the above matter. The hearing was scheduled for June 11 &

12, 1991. The letter notified the Agency that it was responsible for arranging for a court reporter to take a verbatim transcript of the hearing. The hearing was held on June 11 & 12, 1991. (DD-1, CMPL Exh-B, pgs 11-14.) (See Petition Appendix ("P Appen" - G.)

B) On December 2, 1991, I was notified via certified mail by EEOC District Director, John P. Rowe, that a recommended decision, investigative file and hearing transcripts had been forwarded to Department of the Treasury, Washington, D.C. . (DD-1, CMPL Exh-B, pg 15.) (See P Appen - H.)

C) On December 11, 1991, I was mailed the hearing transcripts, recommended

decision, and a request to review the documents and respond within seven days to the Office of Equal Opportunity Program in Department of the Treasury, Washington, D.C. . I received the mail on December 13, 1991. (DD-1, CMPL Exh-B, pg 16.) (See P Appen - I.)

D) On December 20, 1991, I responded to the December 11, 1991 request stating that the transcript was not verbatim and a comparison should be made of the original recording to the written transcript prior to the Agency's final decision. The Agency received my respons e on December 26, 1991. (DD-1, CMPL Exh-B, pgs 17-19.)
(See P Appen - J.)

E) On January 18, 1992, after not hearing from the Agency concerning my request for the comparison, I wrote a second request asking that the transcript be returned to the Chicago District EEOC office so that corrections could be made to the transcripts. I also requested a duplicate copy of the audio electronic tape recordings made at the hearing. I also asked the Agency to advise me of their decision as soon as possible. The Agency received my second request on January 22, 1992. (DD-1, CMPL Exh-B, pgs 20, 21.) (See P Appen - K.)

F) On January 28, 1992, after still not hearing from the Agency concerning my request for transcript and electronic tape recording comparison, a third request was mailed to the Agency by U.S.

Senator Paul Simon's office asking for a response through the Department of the Treasury's Legislative Affairs Office. (DD-1, CMPL Exh-B, pgs 22-25.) (See P Appen - L.)

G) On February 3, 1992, I received Certifications from the Illinois Department of Professional Regulation, which I had initiated on January 8, 1992, stating that the two people hired by the Agency to make a verbatim record of the EEOC hearing were not licensed or certified as shorthand reporters (court reporters) by the state of Illinois. This evidence was not concrete as the women could have married, thereby changing the last name. (DD-1, CMPL Exh-B, pgs 26, 27.)

H) On February 4, 1992, the Agency issued a final decision accepting the Administrative Judge's recommended decision. It gave no consideration of my requests for a verbatim transcript per 29 CFR Section 1613.218 (h) and did not even mention the matter in the analysis of the case. I received this mail on February 8, 1992. (DD-1, CMPL Exh-B, pgs 28-31.) (See P Appen - M.)

On February 4, 1992, the Department of the Treasury issued its final agency decision (FAD) determining that the evidence contained in the investigation file and hearing transcript was not sufficient to support plaintiff's claims of race and sex discrimination. Thus all above determinations made within the

alleged offending agency were negative due to lack of enough evidence or fact to support the allegations or issue(s) of the complaint.

2. FACTS SUBSEQUENT TO FINAL AGENCY DECISION:

I) On February 27, 1992, the Agency finally answered my letters concerning my request to compare the original electronic tape recording to the written transcript. The Agency stated that I had not given specific evidence that the transcript was defective enough to effect the outcome of the case in any material respect and that I should take the matter up upon an EEOC appeal. I received this letter on March 2, 1992 after the appeal time to EEOC had expired. (DD-1, CMPL Exh-B, pg 32.)

(See P Appen - N.)

J) On March 18, 1992, after having telephoned on March 10, 1992 the Agency's counsel, Ms. Robyn Gilliom, I was sent documentation showing that the contract for the court reporter did not contain any provision for receiving a copy of, or maintaining the audio electronic tape for later review. The Agency had commenced hiring of the personnel on April 3, 1991 and had plenty of time to check their qualifications. I received that mailing on March 20, 1992. (DD-1, CMPL Exh-B, pgs 33-35.) (See P Appen - O.)

K) On March 26, 1992, the Illinois Office of the Secretary of State mailed me certified copies of bond/applications

for notary public filed by the person who transcribed the hearing tapes. The certified bond/applications showed that Anne I. Maziorka had no change of name over the past twelve years and that she was the person that operated the reporting service from her home using a P.O. Box address for business purposes. With the certifications it was concretely substantiated that she was not listed on the State of Illinois roster of certified shorthand reporters (court reporters) as being competent to practice court reporting duties. The person who electronically recorded the hearing was not listed on the roster for notary public and no certifications could be obtained for her. However, since she identified herself twice at the hearing (both days) as Diane Lyons

and she is not listed on the Illinois roster of shorthand reporters (court reporters), she can not be considered as competent to practice court reporting duties. I received that mail on March 31, 1992. (DD-1, CMPL Exh-B, pgs 36-48.)

L) On March 30, 1992, I mailed to Anne I. Maziorka (certified return receipt mail) a letter requesting a duplicate copy of the audio electronic tape recording of the hearing. She received the letter on April 1, 1992. However, as of this date April 8, 1992, I have not had any response from the letter mailed to her. (DD-1, CMPL Exh-B, pgs 49, 50.)

M) Even the transcript certifications made by Anne I. Maziorka are false. She states, "That the said hearing was taken before me at the time and place specified." She was never present during the hearing on either of the two days. (DD-1, CMPL Exh-B, pgs 56-59.)

The administrative hearing was only electronically audio tape recorded and the sole original record was not produced by the Agency or the Notary Public; thereby making any corrections to the non-verbatim transcript impossible.

C. AGENCY'S ACTIONS CONTRARY TO EEOC REGULATIONS:

The agency's actions of processing White's EEOC complaint were contrary to specific EEOC regulations. 29 CFR

§1613.218(d)(4) states in pertinent part: " (d) Powers of Administrative Judge. In addition to the other powers vested in the Administrative Judge in accordance with this subpart, the Administrative Judge is authorizes to:

(4) Order the production of documents, records, comparative data, statistics, affidavits or the attendance of witnesses;"

Thus when comparing subsequent agency action to authority of the EEOC prescribed regulations, the agency action is shown to be contrary as follows:

A) On March 26, 1991, Mary A. Pappas, Administrative Judge, issued a letter of notice for hearing in the above matter. The hearing was scheduled for June 11 &

12, 1991. The letter notified the Agency that it was responsible for arranging for a court reporter to take a verbatim transcript of the hearing. The hearing was held on June 11 & 12, 1991. (DD-1, CMPL Exh-B, pgs 11-14.) (See P Appen - G.)

G) On February 3, 1992, I received Certifications from the Illinois Department of Professional Regulation, which I had initiated on January 8, 1992, stating that the two people hired by the Agency to make a verbatim record of the EEOC hearing were not licensed or certified as shorthand reporters (court reporters) by the state of Illinois. This evidence was not concrete as the women could have married, thereby changing the last name. (DD-1, CMPL

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hearing was not listed on the roster for notary public and no certifications could be obtained for her. However, since she identified herself twice at the hearing (both days) as Diane Lyons and she is not listed on the Illinois roster of shorthand reporters (court reporters), she can not be considered as competent to practice court reporting duties. I received that mail on March 31, 1992. (DD-1, CMPL Exh-B, pgs 36-48.)

Thus the agency actions of hiring a Notary Public of Illinois to prepare a transcript of the administrative hearing was contrary to orders of the administrative judge and thereby contrary to EEOC prescribed regulation 29 CFR 1613.218(d)(4).

Subsequent to having a non-verbatim

hearing transcript prepared by a notary public, the agency did not follow prescribed EEOC regulations for dispensing the hearing record to White. EEOC regulation 29 CFR §1613.221(b)(2) states in pertinent part:

"...(2) When the Administrative Judge has issued a recommended decision on the complaint under §1613.218(g) or (i)(3), the decision letter shall transmit a copy of such recommended decision and a copy of the hearing record if a hearing was held. ..."

Thus again when comparing subsequent agency action to the authority of EEOC regulations, the agency action is shown to be contrary as follows:

C) On December 11, 1991, I was mailed the hearing transcripts, recommended

decision, and a request to review the documents and respond within seven days to the Office of Equal Opportunity Program in Department of the Treasury, Washington, D.C. . I received the mail on December 13, 1991. (DD-1, CMPL Exh-B, pg 16.) (See P Appen - I.)

H) On February 4, 1992, the Agency issued a final decision accepting the Administrative Judge's recommended decision. It gave no consideration of my requests for a verbatim transcript per 29 CFR Section 1613.218 (h) and did not even mention the matter in the analysis of the case. I received this mail on February 8, 1992. (DD-1, CMPL Exh-B, pgs 28-31.) (See P Appen - M.)

Thus, the non-verbatim hearing record was mailed, contrary to EEOC prescribed regulation 29 CFR §1613.221(b)(2), by sending it to White almost two months ahead of the prescribed time of mailing it with the final decision letter. The agency stated that consideration would be given to White's feedback if mailed within seven days of reoeipt to the Director - Office of Equal Employment Opportunity in Washington, DC. .

Although EEOC regulation 29 CFR §1613.204(d)(5) states in pertinent part: "Implementation of agency program. - To implement the program established under this subpart, an agency shall;..... (d) Assign to the Director of Equal Employment

Opportunity the functions of:

...(5) Providing for the receipt and investigation of individual complaints of discrimination in personnel matters within the agency, subject to §§1613.211 through 1613.222;" , White's timely response to the agency's December 11, 1991 letter was given consideration by the agency's Director - Office of Equal Opportunity Program as follows:

D) On December 20, 1991, I responded to the December 11, 1991 request stating that the transcript was not verbatim and a comparison should be made of the original recording to the written transcript prior to the Agency's final decision. The Agency received my response on December 26, 1991. (DD-1, CMPL Exh-B, pgs 17-19.; See P Appen - J)

E) On January 18, 1992, after not hearing from the Agency concerning my request for the comparison, I wrote a second request asking that the transcript be returned to the Chicago District EEOC office so that corrections could be made to the transcripts. I also requested a duplicate copy of the audio electronic tape recordings made at the hearing. I also asked the Agency to advise me of their decision as soon as possible. The Agency received my second request on January 22, 1992. (DD-1, CMPL Exh-B, pgs 20, 21.) (See P Appen - K.)

F) On January 28, 1992, after still not hearing from the Agency concerning my request for transcript and electronic

tape recording comparison, a third request was mailed to the Agency by U.S. Senator Paul Simon's office asking for a response through the Department of the Treasury's Legislative Affairs Office. (DD-1, CMPL Exh-B, pgs 22-25.) (See P Appen - L.)

H) On February 4, 1992, the Agency issued a final decision accepting the Administrative Judge's recommended decision. It gave no consideration of my requests for a verbatim transcript per 29 CFR Section 1613.218 (h) and did not even mention the matter in the analysis of the case. I received this mail on February 8, 1992. (DD-1, CMPL Exh-B, pgs 28-31.) (See P Appen - M.)

I) On February 27, 1992, the Agency finally answered my letters concerning my request to compare the original electronic tape recording to the written transcript. The Agency stated that I had not given specific evidence that the transcript was defective enough to effect the outcome of the case in any material respect and that I should take the matter up upon an EEOC appeal. I received this letter on March 2, 1992 after the appeal time to EEOC had expired. (DD-1, CMPL Exh-B, pg 32.) (See P Appen - N.)

Thus, the agency's Director's action of mailing the February 27, 1992 letter responding to White's comments and inquiry over sixty days after receipt is contrary to the authority of EEOC regulations 29 CFR §1613.204(d)(5) and

29 CFR §1613.203(k). (29 CFR §1613.203(k) states in pertinent part: "...Under terms of its program, an agency shall: ... (k) Provide for the prompt, fair, and impartial consideration and disposition of complaints involving issues of discrimination on grounds of race, color, religion, sex, or national origin;..")

If the agency had followed the above EEOC prescribed regulations, White would never have been deceived that consideration of correcting the nonverbatim transcript prior to the making of a final decision had been done and appeal to EEOC within the 20 days would have been made timely.

D. APPEAL TO EEOC

Plaintiff appealed late to EEOC on April

8, 1992 stating that a non-verbatim transcript had been used in making the (FAD) giving reasons and circumstances in the appeal for filing late and requesting extension of the filing limitations date. (See DD-1, CMPL Exhibits B & C in their entirety.) On July 6, 1992, the EEOC dismissed petitioner's appeal as untimely, citing the 20-day-time-limitation of 29 CFR §1613.233(a). (See P Appen - F.) Subsequently, petitioner filed suit in U.S. District Court.

E. THE COURSE OF PROCEEDINGS AND ITS DISPOSITION IN U.S. DISTRICT COURT:

On August 21, 1992, Nathaniel White (White), petitioner filed a complaint (CMPL) naming Nicholas F. Brady, Secretary of the Treasury, as defendant

in a civil action alleging employment discrimination based on "Sex (male) and/or Race (black)" for employment practices performed by his immediate supervisor, JinJa Omohundro, as stated above.

Further, White alleged the following: (1) That the processing of his Equal Employment Opportunity ("EEO") Complaint by the Agency was not in accordance with mandatory regulations issued by the Equal Employment Opportunity Commission ("EEOC") and no proper consideration of the complaint's merits was given due to the Agency's affirmative misconduct of misrepresentation, deception, and concealment of pertinent facts relative to the production of a non-verbatim EEOC administrative hearing transcript and

its use in making the Final Agency Decision ("FAD"), which was contrary to 29 CFR §1613.218(h).; (DD-1, CMPL ¶13.)

(2) That due to White's discovery of the Agency's affirmative misconduct subsequent to expiration of the 20-day-time-limit for appealing to the EEOC under 29 CFR §1613.233(a), no timely appeal for actions of the Agency's affirmative misconduct could be made and principles of equity should be invoked allowing the District Court to accept subject matter jurisdiction of the case. (DD-1, CMPL ¶8) In CMPL, White cited 42 U.S.C. §2000e-5 and §2000e-5(g) for jurisdiction and equitable relief respectively. A motion was filed on Feb. 2, 1993 to AMEND CMPL ¶1. to state U.S.C §2000e-16(c) for

jurisdiction and §2000e et seq. for equitable relief. The court granted the motion on Feb. 11, 1993, allowing petitioner to file the amended complaint by filing just the first five (5) pages and retaining all the exhibits to the original complaint in full effect and force as attached to the amended complaint. In DD-1, CMPL¶¶ 8. 9, 11, 12, and 13, White acknowledged his filing appeal to Equal Employment Opportunity Commission (EEOC) late on April 8, 1992 and stated reasons and circumstances. Defendant moved on Jan. 15, 1993, pursuant to F.R. Civ. Proc. 12(b)(1) to dismiss CMPL for lack of subject matter jurisdiction stating plaintiff failed to exhaust administrative remedies in a timely manner prior to filing suit, due to late

filing of appeal to EEOC. The Honorable Judge James H. Alesia referred the matter concerning defendant's F.R. Civ. Proc. 12(b)(1) motion to dismiss to the 7th Circuit Executive Committee for report and recommendation of Magistrate Judge Edward A. Bobrick on January 27, 1993. The Executive Committee approved referral to the Magistrate on January 28, 1993. Petitioner answered defendant's motion on Feb. 16, 1993 requesting that it be denied thereby granting equitable estoppel or equitable tolling of the statute of limitations date for 29 CFR §1613.233(a) based upon stated reasons and circumstances within CMPL. On March 3, 1993, defendant filed, Defendant's Reply to Plaintiff's Response to Defendant's Motion to Dismiss Complaint, stating that

principles of equity was not appropriate for this matter. On March 8, 1993, at status hearing before Magistrate Judge Edward A. Bobrick, petitioner was offered opportunity to give a surreply to Defendant's March 3, 1993 Reply. Petitioner filed a surreply to Defendant's reply of March 3, 1993 on March 19, 1993. Magistrate Judge Edward A. Bobrick completed his duties pursuant to Rule 1.70C (1) of the U. S. District Court, Northern District of Illinois on April 13, 1993 by issuing Report and Recommendation (dated April 13, 1993), which did not grant Defendant's F.R.Civ. Proc. 12(b)(1) motion, but recommended that the Court dismiss complaint. Petitioner having received Magistrate Bobrick's report on April 16, 1993, raised objections to the Report and

Recommendation of the Magistrate. On April 23, 1993, Plaintiff objected to Magistrate Bobrick's Report and Recommendation in its entirety as explained in the MEMORANDUM IN SUPPORT OF: PLAINTIFF'S OBJECTIONS (PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 72(A)) TO: REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE EDWARD A. BOBRICK (DATED APRIL 13, 1993). On August 20, 1993, Honorable Judge James H. Alesia overruled plaintiff's objections and issued final judgement/ order dismissing the case with prejudice for delay in filing to the EEOC.

F. THE COURSE OF PROCEEDINGS AND ITS DISPOSITION IN U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT:

Petitioner filed notice of appeal to United States Court of Appeals for

Seventh Circuit on October 18, 1993. Petitioner appealed requesting the court to reverse and remand the case back to the District Court, thereby invoking principles of equity due to affirmative misconduct of the Agency allowing it to accept subject matter jurisdiction of the case to consider its merits. On July 29, 1994, the Seventh Circuit affirmed the District Court's decision. Petitioner filed a timely Petition for Rehearing with Suggestion for Rehearing En Banc. The petition for rehearing asked the entire Seventh Circuit to consider the Agency's actions of affirmative misconduct. The Petition for Rehearing was denied September 8, 1994.

WHY THE WRIT SHOULD BE GRANTED

A. LOWER COURTS FAILED TO CONSIDER

AFFIRMATIVE MISCONDUCT ISSUE:

The facts of this case are uncontroverted by the Agency. However, this case involves a material issue questioning law - whether principles of equity should be invoked due to circumstances beyond petitioners control (29 CFR §1613.233(c)) to allow the U.S. District Court to accept subject matter jurisdiction of petitioner's case due to the Agency's actions of alleged affirmative misconduct of misrepresentation, deception, and concealment of material facts concerning evidence used in making the Final Agency Decision; whereas the Agency's alleged affirmative misconduct became known to petitioner subsequent to expiration of his 20-day-limit administrative appeal time to Equal Employment Opportunity

Commission pursuant to 29 CFR §1613.233(a).

As discussed above in C. AGENCY'S ACTIONS CONTRARY TO EEOC REGULATIONS, the defendant actions of processing White's complaint was not within the mandatory regulations. Those actions suggest and constitute affirmative misconduct by defendant. Santiago v. INS, 526 F.2d 488, at 493, (9th Cir.1975.) Defendant's actions caused plaintiff to delay appeal to EEOC through misrepresentation of stating that a notary public was a court reporter, deception that consideration was given to comments timely sent to the Director - Equal Opportunity Program, and concealment about using non-verbatim hearing record in making the final agency decision until plaintiff's appeal

time period had expired.

White argues in DD-1, CMPL ¶8 the following: "¶8. Due to Plaintiff having no specific or definite knowledge of the non-verbatim transcript not being corrected by the Department of the Treasury (Agency) prior to issuing the Final Agency Decision until March 2, 1992 and attempting to acquire a copy of the original audio electronic recording of the hearing along with other evidence relative to the authentication of the hearing transcript, a timely appeal could not be made to Equal Employment Opportunity Commission (EEOC). (See Exhibits B & C attached hereto.)"

Plaintiff's appeal to the EEOC was made on April 8, 1992. Prior to March 2, 1992, until receipt of Ronald A.

Glasser's (Dir.OEOP, Washington, D.C.) letter dated February 27, 1992, White had decided not to appeal the Final Agency Decision (FAD) issued February 4, 1992 and received by him on February 8, 1992. White was reasonably sure that the merits of his complaint had been given proper consideration and that the negative decision had been properly reached based upon the agency's communications. White had been deceived into believing that a proper corrected hearing transcript which in turn had been properly prepared by court reporters was used in reaching the FAD. White had no reason to believe otherwise. Thus White had decided no appeal to the EEOC or court would be necessary. White reasonably relied on the communications of the agency as a

whole but particularly on:

1) March 26, 1991 letter of Mary A. Pappas, AJ, stating that the Agency was to hire a court reporter for verbatim record of the administrative hearing. (DD-1, CMPL Exh-B, pgs 11-14.)

2) December 11, 1991 letter of Ronald A. Glasser, Dir.- OEOP, Washington, D.C. stating comments would be considered if submitted not latter that 7 (seven) calendar days from receipt of the transcript and recommended decision. (DD-1, CMPL Exh-B, pg 16.)

3) February 4, 1992 letter of Agency stating Final Agency Decision stating, "The complainant, disagreeing with the AJ's analysis and recommended decision, submitted comments concerning the weight given certain evidence by the Administrative Judge. These comments

have been considered in reaching this final agency decision." (DD-1, CMPL Exh-B, pgs 28-31.)

However, on March 2, 1992, White via Glasser's letter (dated Feb. 27, 1992) learned that he had been harmed by use of a nonverbatim hearing transcript and decided to inquire further about the matter. White's inquiry is detailed in DD-1, CMPL Exh-B, pgs 33 thru 50.

It was only on March 31, 1992 that White knew that the whole hearing transcript was prepared contrary to what he had relied on and been informed via written communications starting with the AJ's letter on March 26, 1991 thru the FAD received on February 8, 1992. Although White had received Certifications from the State of

Illinois Dept. of Professional Regulations stating that neither of the two women were listed as court reporters, this was not yet reasonable evidence to make any contrary conclusion concerning the preparation or use of the hearing transcript as both women could have been listed with different names due to changes for marriage. White's intent was to place a complaint against both of their licenses for the discrepancies made in hearing transcript. Thus White had no reason to appeal anywhere between February 8, 1992 and February 28, 1992 as he had not yet received any specific reason to want an appeal until March 2, 1992. Up until March 2, 1992, there was no concrete reason to believe that the Agency had misinformed him in anyway. White then

wrote to appeal to EEOC on April 8, 1992, asking it to invoke 29 CFR §1613.233(c) to extend the time for appeal writing in retrospect : On February 4, 1992, the Agency issued a final decision accepting the Administrative Judge's recommended decision. It gave no consideration of my requests for a verbatim transcript per 29 CFR Section 1613.218 (h) and did not even mention the matter in the analysis of the case. Petitioner received this mail on February 8, 1992. (See DD-1, CMPL Exh-B, pgs 28-31.) The EEOC states White's reason for filing late as, " Specifically, appellant claims that, after repeated attempts, he was unable to obtain the necessary information (an allegedly nonverbatim transcript) from the agency

to support his appeal." (DD-1, CMPL Exh-E , pg 1.) It is possible that EEOC misunderstood the appeal or errored in its discretion not to allow a late appeal as it made no mention of the Agency using the nonverbatim transcript in making the Final Agency Decision. White's communications subsequent to March 2, 1992 show he acted diligently to file appeal once notified March 2, 1992 that he had been harmed. No Federal or State law, rule or regulation can deem either person hired by the Agency to record the administrative hearing as being a court reporter. This was clearly a form of misrepresentation, deception and concealment. It took sixty days for the Agency to respond. (December 26, 1991 thru February 27, 1992) Thus, in context with above

previously cited court case along with Cada v. Baxter Healthcare Corp., 920 F.2d 446 (7th Cir.1990), the court should conclude, "If fraudulent concealment is shown the court must subtract from the period of limitations the entire period in which the tolling condition is in effect, Ott v. Midland-Ross Corp., 600F.2d 24, 33 (6th Cir.1979)" cited in Cada v. Baxter Healthcare Corp. 920 F.2d 446, (7th Cir. 1990), at p. 452. White has evidenced his reasons for filing late appeal to EEOC on April 8, 1992, due to only having obtained the evidence or discovery of fraudulent concealment with respect to the preparation of the non-verbatim transcript on March 31, 1992. White was attempting throughout December 20, 1991 thru March 31, 1992 to

obtain a verbatim transcript only to find out that no verbatim transcript was ever prepared. To this date, White has never received a verbatim transcript of the June 11, & 12, 1991 EEOC administrative hearing.

Although the actions of the Agency and the petitioner were fully documented by signed typed written correspondence, the U.S. District Court and U.S. Court of Appeals for the Seventh Circuit failed to consider the Agency's actions which were contrary to EEOC regulations, as no written analysis was issued by either court stating why such actions were not affirmative misconduct.

B. THE DECISION OF THE SEVENTH CIRCUIT CONFLICTS WITH GUIDANCE ISSUED BY THE U.S.SUPREME COURT:

The U.S. District Court errored in reaching it's decision to dismiss White's CMPL for at least two reasons. First, the court failed to follow guidance of the Supreme Court in cases where a plaintiff fails to timely file in a Title VII case and relies on equitable tolling. " The Supreme Court's recent decision in Baldwin County Welcome Center v. Brown, 104 S.Ct. 1723, at 1725, (1984), a case involving a failure by plaintiff to timely file in a Title VII case, sets forth the relevant factors and circumstances that a court should consider in determining whether a party may rely on equitable tolling or waiver: (1) ...a case in which claimant has received inadequate notice,... or (2) where a motion for appointment of counsel is pending and

equity would justify tolling the statutory period until the motion is acted upon,... or (3) where the court has led the plaintiff to believe that she had done everything required of her,.. or (4) where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction.... One who fails to act diligently cannot invoke equitable principles to excuse the lack of diligence." Peiisoto v. Weinberger, 638 F. Supp. 1353, at 1367, (W.D. Tex. 1986)

The general rule of using Baldwin, Id. was reiterated by the Supreme Court in Irwin v. Veterans Admin., 112 L.Ed 2d 435, at 444 (1990), stating, "We have allowed equitable tolling in situations.... where the complainant has been induced or tricked by his

adversary's misconduct into allowing a filing deadline to pass." It is well settled that when an adversary's misrepresentation caused plaintiff to let a filing period lapse, equitable tolling should be invoked. Gluss v. Brooklyn Eastern District Terminal, 79 S.Ct. 760 (1959); Holmberg v. Armbrecht, 66 S.Ct. 582 (1946).

Secondly, the U.S. Distict Court Magistrate's R&R throughout the analysis and report fails to consider that the administrative rules of the EEOC, 29 CFR §1613. et seq., with respect to the Agency's actions, legislative in nature, have "the force and effect of law". Chrysler Corp. v. Brown, 99 S.Ct. 1705, 1714 (1979); and United States v. Nixon, 94 S.Ct. 3090, 3101 (1974). The Seventh Circuit recently stated that such rules

are as binding on the courts as any statute enacted by Congress. Production Tool v. Employment & Training Administration, 688 F.2d 1161, at 1165-66 (7th Cir.1982). Thus the Magistrate should have considered the Agency's Actions Contrary To EEOC Regulation cited above.

C. THE SEVENTH CIRCUIT RULING CONFLICTS WITH A DECISION OF THE FOURTH CIRCUIT:

Under 29 CFR §1613.214(a)(1)(i) a 30-day-time -limit for initiating a EEO complaint exists. In Weick v. O'Keefe, 26 F.3d 467, (4th Cir. 1994), decided June 8, 1994, the Secretary of the Navy was estopped from dismissal of the EEO complaint filed over three years late due to deliberate misconduct of naval officials which lulled plaintiff into

inaction. Weick relied upon verbal statements of Naval officials which misrepresented facts about her case subsequent to her inquiry about factors used in the promotion process. (Id., at 470 - 471.)

The facts of White's case were substantiated by signed type written correspondence showing his diligence and reliance upon statements and actions of the Treasury Director of Equal Employment Opportunity Program, Washington, D.C., which were later shown to be false and contrary to EEOC regulations. Therefore the two Circuits do not treat similar facts with similar considerations for equitable tolling principles under EEOC regulations.

D. THE STANDARD GROUNDS FOR EQUITABLE TOLLING AND ESTOPPEL USED TO CONSIDER MISCONDUCT CASES DIFFERS AMONG CIRCUITS:

The U.S. Circuits for Appeal do not consider case facts of misconduct for equitable tolling and estoppel with a uniform set of standard grounds.

In Long v. Frank, 22 F.3d 54 (2nd Cir. 1994), decided April 15, 1994, the courts' opinion states at page 58, " Under the doctrine of equitable tolling, a complainant may be allowed to file his or her claim outside the applicable limitations period if, because of some action on the defendant's part, the complainant was unaware that the cause of action existed."

In Weick v. O'Keefe, 26 F.3d 467 (4th Cir. 1994), at page 470 the opinion

states deliberate misconduct,and reasonable reliance were factors considered for equitable tolling.

In Glarner v. U.S. Dept. of Veteran Admin., 30 F.3d 697 (6th Cir. 1994) the opinion states at page 702, "The factors that this court considers in deciding whether to apply the doctrine of equitable tolling are (1) lack of actual notice of the filing requirement; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement."

In Miller v. Runyon, 32 F.3d 386 (8th Cir. 1994), the courts opinion states at page 389, "Equitable tolling arises upon some positive misconduct by

the party against whom it is asserted,.. or a misrepresentation as to the filing deadline...."

In Jarrett v. U.S. Sprint Communications Co., 22 F.3d 256 (10th Cir. 1994), decided April 26, 1994, the opinion states at page 260, "In this circuit, a Title VII time limit will be tolled only if there has been active deception of the claimant regarding procedural requirements."

In National Cement v. FMSHRC, 27 F.3d 526 (11th Cir. 1994), the court's opinion states at page 531, prejudice and due diligence are factors being considered for equitable tolling.

In this case White v. Bentsen, 31 F.3d 474 (7th Cir. 1994) at page 475, the opinion states, "He does not contend that the IRS misled him in any way about

the applicable deadlines or prevented him from initiating the process before the EEOC. The standard grounds of equitable tolling and estoppel, on which see Cada v. Baxter Healthcare Corp., 920 F.2d 466 (7th Cir. 1990) are accordingly absent." Thus the Seventh Circuit does not consider the Agency's actions contrary to EEOC regulations in its standard grounds of equitable tolling and estoppel; thereby disregarding the Supreme Courts advice of, "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of even handed administration of the law." Mohasco Corp. v. Silver, 447 U.S. 807 at 826. The Supreme Court should address the different standard grounds used by the Circuits in

considering misconduct cases for granting principles of equity by explaining the term affirmative misconduct now; as leaving the term undefined allows defendants to abate Congress's Civil Rights Act through illegal behavior.

CONCLUSION:

Petitioner White respectfully request that the Supreme Court grant a writ of certiorari and rule allowing this case to be remanded to the Court of Appeals for the Seventh Circuit with an order for it to send it back to the U.S. District Court for the Northern District of Illinois, Eastern Division, to

consider the merits of White's EEOC complaint.

DATED: December 3, 1994

Respectfully Submitted

Nathaniel White
Petitioner "PRO SE"
P.O. BOX 23201
Chicago, ILL. 60623

In the
United States Court of Appeals
For the Seventh Circuit

No. 93-3545

NATHANIEL WHITE,

Plaintiff-Appellant,

v.

LLOYD BENTSEN, Secretary of the Treasury,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 5633—James H. Alesia, *Judge.*

SUBMITTED JULY 14, 1994—DECIDED JULY 29, 1994

Before POSNER, *Chief Judge*, and EASTERBROOK and KANNE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Nathaniel White, employed by the Internal Revenue Service as a revenue agent, believes that his race and sex explain the agency's failure to promote him to a higher grade. He filed an administrative complaint under Title VII of the Civil Rights Act of 1964 and received a hearing before an administrative law judge, who concluded that White's belief is unfounded. The ALJ informed White that he could obtain additional review in one of two ways: by filing suit in a district court within 90 days, or by filing an appeal to the Equal Employment Opportunity Commission within 20

days. See 42 U.S.C. §2000e-16(c), 29 C.F.R. §1613.233(a). White did neither. He appealed to the EEOC 60 days after receiving the notice. The EEOC dismissed the appeal as untimely, and the district court then dismissed White's complaint on the ground that the delay bars further action. (By the time the EEOC dismissed the appeal, it was too late for White to commence an independent suit under the 90-day option.)

The IRS sought to dismiss the case under Fed. R. Civ. P. 12(b)(1), contending that White's delay deprived the district court of subject-matter jurisdiction. If the time limit in 29 C.F.R. §1613.233(a) is "jurisdictional," then delay may not be excused on account of equitable tolling and related doctrines. White believes that his delay is justifiable, and the IRS contended that the court should not inquire into this contention. Magistrate Judge Bobrick filed a report observing that our court's most recent word on the subject is equivocal. *McGinty v. Department of the Army*, 900 F.2d 1114, 1117-18 (7th Cir. 1990), rejected a claim of tolling on the merits without deciding whether a court has the power to entertain such arguments in the first place. Following the same approach, Judge Bobrick recommended that the district judge examine the tolling argument, find it wanting, and dismiss the suit. The district judge adopted this recommendation.

In this court the IRS renews its argument that the district court lacked subject-matter jurisdiction. This argument would have met with success a few years ago, for until recently courts characterized as jurisdictional any limitations on the federal government's consent to be sued. E.g., *Sims v. Heckler*, 725 F.2d 1143 (7th Cir. 1984). But in *Rennie v. Garrett*, 896 F.2d 1057 (7th Cir. 1990), we overruled *Sims* and held that the time limits for initial claims of employment discrimination by federal agencies are subject to equitable tolling and estoppel. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), held that the time limits for making claims of discrimination against private employers are not jurisdictional; *Rennie* concluded that because Congress has subjected private and public

employers to the same substantive rules, there is no reason to give a stingy reading to the terms and conditions in the legislation applicable to public employers.

Within a year, the Supreme Court approved both the approach and the holding of *Rennie*. In *Irwin v. Veterans Administration*, 498 U.S. 89 (1990), the Court concluded that the time limits specified in §2000e-16(c) for commencing civil actions are subject to equitable tolling: "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 498 U.S. at 95-96. What is true of the *statutory* time limit for filing suits is no less true of the *regulatory* time limit for invoking review by the EEOC. We cannot imagine an argument for treating a time limit in a regulation as "jurisdictional" while time limits in statutes are subject to waiver and estoppel. The answer to the question reserved in *McGinty* then is: "The time limit in 29 C.F.R. §1613.233(a) is not jurisdictional." Cf. *Weinberger v. Salfi*, 422 U.S. 749, 763-67 (1975) (the only jurisdictional component of the administrative process under the Social Security Act is a final decision by the Secretary; details of the process are not jurisdictional); accord, *Bowen v. City of New York*, 476 U.S. 467 (1986).

White had 20 days to seek administrative review and took 60. His excuse is that he believes that the transcript of the hearing before the ALJ is inaccurate. White investigated whether the two court reporters engaged to transcribe the tape recording of the hearing are licensed by Illinois; he found that they are not. After making this discovery, he appealed to the EEOC, which was not impressed with this explanation for the belated filing. The regulation permits delay when the employee is unaware of the deadline or circumstances beyond his control delay an appeal, §1613.233(c), but White was well aware of the time available and able to act within that bound. Errors in the transcript are reasons to appeal, not reasons to delay appeals. That White was still gathering details (the IRS tarried in sending him a copy of the tape recording) did not prevent him from appealing. He does not contend that

the IRS misled him in any way about the applicable deadlines or prevented him from initiating the process before the EEOC. The standard grounds of equitable tolling and estoppel, on which see *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990), are accordingly absent. White was told exactly what to do and when to do it. One who decides to follow a schedule of his own devising, for reasons of his own invention, has no legitimate complaint when the tribunal adheres to the rules. *McNeil v. United States*, 113 S. Ct. 1980 (1993); *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1983).

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

COURT OF APPEALS ORDER - AFFIRMING

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT - WITHOUT ORAL ARGUMENT

Date: July 29, 1994

BEFORE:

Honorable RICHARD A. POSNER,
Chief Judge

Honorable FRANK H. EASTERBROOK,
Circuit Judge

Honorable MICHAEL S. KANNE,
Circuit Judge

No. 93-3545

NATHANIEL WHITE,
Plaintiff - Appellant

v.

LLOYD BENTSEN, Secretary of the U.S. Department of the Treasury,
Defendant - Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 92 C 5633, James H. Alesia, Judge

The judgment of the District Court is AFFIRMED, with costs in accordance with the decision of this court entered on this date.

(1060 - 110393)

APPENDIX C
MAGISTRATE'S REPORT & RECOMMENDATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Nathaniel White, Plaintiff, vs.	)	
LLOYD BENTSEN, Defendant.	)	No. 92 C 5633

HONORABLE JAMES H. ALESIA, JUDGE
UNITED STATES DISTRICT COURT

HONORABLE JUDGE:

REPORT AND RECOMMENDATION
of Magistrate Judge Edward A. Bobrick

Before the court is the motion of the defendant Secretary of the Treasury to dismiss the complaint of plaintiff Nathaniel White for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

The plaintiff, a federal employee, filed a complaint alleging employment discrimination based on sex and race

under Title VII of the Civil Rights Act of 1964.[1] Essentially, plaintiff alleged that the Internal Revenue Service ("IRS") discriminated against him by failing to promote him because of he is a black male. Defendant now moves to dismiss plaintiff's complaint, arguing that plaintiff failed to follow the applicable procedures before the Equal Employment Opportunity Commission ("EEOC") before filing his federal claim. As a result, according to defendant, this court has no jurisdiction over plaintiff's complaint.

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[1] Plaintiff originally filed his complaint under 42 U.S.C. §2000e-5, which pertains only to private sector employers and employees. The court subsequently allowed plaintiff to correct his complaint by bringing it under 42 U.S.C. §2000e-16(c), covering federal employment discrimination.

I. BACKGROUND

A. Facts

Plaintiff is a revenue agent who has work for the IRS since 1975. On June 20, 1990, he filed charges of discrimination with the EEOC, citing several incidents he felt supported his claim. The EEOC conducted an investigation of the charges and convened a hearing on June 11 and 12, 1991. An administrative law judge("ALJ") rendered a recommended decision in plaintiff's case on November 6, 1991. According to plaintiff EEOC notified him of the decision by certified mail on December 2, 1991. (Memorandum in Support of Plaintiff's Answer, at 4). Plaintiff further claims that, on December 13, 1991, he received a hearing transcript, recommended decision, and a request to review those documents within seven days.

hearing transcript was, in his opinion, inaccurate, and informed the IRS, which was responsible for compiling the transcript, by mail on December 20, 1991. (Id.).

When the IRS failed to respond, plaintiff reiterated his concerns regarding the accuracy of the hearing transcript in a letter dated January 18, 1992. (Id.). In that letter, plaintiff asked that the transcript be corrected and requested a copy of the audio tape of the hearing. (Id.). Ten days later, plaintiff informed the IRS of his concerns once more, this time through the office of U.S. Senator Paul Simon. (Id., at 5). During this time, plaintiff claims to have discovered that the transcribers the IRS employed at plaintiff's hearing were neither licensed nor certified according

to the Illinois Department of Professional Regulation. (Id.).

On February 4, 1992, the EEOC issued its final decision in plaintiff's case, finding that the evidence was insufficient to support plaintiff's charges of discrimination. Plaintiff received notification of the final decision on February 8, 1992, along with the following information regarding plaintiff's appeal rights:

If you are dissatisfied with this decision, you are entitled to file a civil action in the appropriate United States District Court, OR, you may first file an appeal with the Equal Employment Opportunity Commission (EEOC). If an appeal to EEOC is filed, the complainant retains the right to file a civil action in the appropriate United States District

Court within ninety (90) calendar days of receipt of EEOC's final decision or after 180 days have passed from the date of filing the appeal if there has been no EEOC decision.

FILING A CIVIL ACTION IN THE UNITED STATES DISTRICT COURT

If you choose to file a civil action, the action MUST be filed with the Clerk of the appropriate U.S. District Court WITHIN NINETY (90) CALENDAR DAYS OF THE DATE on which you receive this decision. The Department cannot extend this time limit.

* * *

FILING AN APPEAL WITH THE EEOC

If you choose to appeal this decision to the EEOC, the appeal must be submitted in writing WITHIN TWENTY (20) CALENDAR DAYS of the date you receive this decision to:

to:

Director

Office of Federal Operations

Equal Employment Opportunity Commission

1801 L Street, N.W., Suite 5000

P.O. Box 18948

Washington, D.C. 20036

The following excerpt from the EEOC's regulation in Title 29 C.F.R. Section 1613.233 applies to any appeal to the EEOC:

(a) Except as provided in paragraph (c) of this section, a complainant may file a notice of appeal at any time up to 20 calendar days after receipt of the agency's notice of final decision on his or her complaint. An appeal shall be deemed filed on the date it is postmarked, or, in the absence of a postmark, on the date it is received by the Commission.

appeal must be submitted to the Commission and the defendant agency within 30 calendar days of filing the notice of appeal. For purposes of this part, the decision of an agency shall be final only when the agency makes a determination on all issues in the complaint, including whether or not to award attorney's fees or costs. If a decision to award attorney's fees or costs is made, the procedure is followed for determining the amount of the award as set forth in section 1613.271(c).

(c) The 20-day time limit within which a notice of appeal must be filed will not be extended by the Commission unless, based upon a written statement by the complainant showing that he or she was not notified of the prescribed time limit and was not otherwise aware of it or that filing of a Notice of Appeal within the

filing of a Notice of Appeal within the prescribed time limit, the Commission exercises its discretion to extend the time limit and accept the Appeal.

Accordingly, plaintiff had two options: he could appeal the EEOC decision within 20 days of February 8, 1991; or he could file a complaint in federal district court within 90 days of February 8, 1991.

According to plaintiff, the IRS finally responded to his transcript concerns in a letter dated February 27, 1992, which plaintiff received March 2, 1992. (Id., at 5). In that communication, the agency stated that plaintiff had not provided evidence that the transcript was defective enough to affect the outcome of his case, and that the matter should be taken upon appeal to the EEOC. (Id.). Plaintiff then attempted, without success,

of the reporters listed as having worked at the hearing. (Id., at 6). Finally, on April 8, 1992, plaintiff filed his appeal with the EEOC, sixty days after he received the EEOC's decision. The EEOC dismissed the appeal as untimely under 29 C.F.R. §1613.233(a), which provides the twenty-day time limit for filing EEOC appeals, and refused to extend the limit under 29 C.F.R. §1613.233(c). Supra, at 5. Plaintiff received the dismissal, along with a right-to-sue letter on July 24, 1992, and filed this action on August 21, 1992.

B. Parties' Positions

Defendant argues that, because plaintiff failed to file his appeal with the EEOC within the twenty-day time limit, this court has no jurisdiction over plaintiff's federal cause of action.

plaintiff's federal cause of action. Plaintiff counters that he has a legitimate excuse for his failure to meet the EEOC deadline -- the inaccurate transcript -- and that the court should apply the doctrine of equitable tolling and exercise jurisdiction over his complaint. Defendant responds by arguing that the doctrine of equitable tolling is inapplicable to this case. We consider the parties' position, in the context of defendant's 12(b)(1) motion.

II. ANALYSIS

In order to determine whether it has jurisdiction over a complaint, the court may look beyond the face of the complaint to resolve any factual disputes. Rennie v. Garrett, 896 F.2d 1957, 1058 (7th Cir. 1990). The party asserting jurisdiction has the burden of

S.P.A. v. Diadora America, Inc., 141 F.R.D. 74 (N.D. Ill. 1991) (citing Western Transportation Co. v. Couzens Warehouse & Distributors, Inc., 695 F.2d 1033, 1038 (7th Cir. 1982)). In this case, then, the burden is on the plaintiff to establish jurisdiction, and we may look beyond his complaint in order to make a determination.

The parties' central dispute herein is whether the twenty-day limit for filing an EEOC appeal is a jurisdictional requirement or a statute of limitations. If it is a jurisdictional requirement, plaintiff clearly failed to meet it and his complaint must be dismissed; if it is in the nature of a statute of limitations, then it is subject to the principles of equitable tolling. Zipes v. Trans World Airlines, Inc., 455 U.S. 385,398, 102

S.Ct. 1127, 1135 (1982); McGinty v. U.S. Dept. of Army, 900 F.2d 1114, 1118 (7th Cir. 1990). Defendant argues that the requirement is jurisdictional, citing Tolbert v. United States, 916 F.2d 245, 247-248 (5th Cir. 1990); and Patel v. Derwinski, 778 F.Supp. 1450, 1454 (N.D. Ill. 1991). Neither Tolbert nor Patel, however, are applicable here, as they both involve the 180-day period a plaintiff must wait to file a federal lawsuit after having initiated the EEOC appeal process. Tolbert, 916 F.2d at 248-49; Patel, at 778 F.Supp. at 1454. The 180-day waiting period is a jurisdictional requirement that is part and parcel with the rule that EEOC plaintiffs must exhaust their administrative remedies before filing a federal cause of action. In this case, it cannot be argued that plaintiff failed to

he brought his federal complaint. He pursued his appeal to its conclusion, if unsuccessfully. Accordingly, we must determine whether his failure to meet the 20-day deadline robs this court of jurisdiction over this matter, or whether equitable tolling principles apply.

In McGinty, the Seventh Circuit face a similar question, except that an Age Discrimination and Employment Act claim was involved. The plaintiff had failed to meet the 20-day deadline for filing her administrative appeal, so the EEOC dismissed the appeal and issued a right-to-sue letter. 900F.2d at 1116. The district court dismissed the plaintiff's federal cause of action for lack of subject matter jurisdiction due to the plaintiff's failure to meet the administrative time limit for filing an

appeal. Id. On appeal, the court noted that it had held, in Rennie v. Garrett, 896 F.2d 1057 (7th Cir. 1990), that Title VII's 30-day time limit for bringing a complaint to the attention of EEOC counselor was a statute of limitations, rather than a jurisdictional prerequisite.[2] Id. at 1118. The court further noted that if administrative deadlines were construed as statutes of

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[2] Rennie has, at times, been characterized as holding that Title VII deadlines in general should be construed as statutes of limitations rather than jurisdictional prerequisites. See, e.g., , 900 F.2d at 1118; Lackhouse v. Brady, 746 F.Supp. 751, 753 (N.D. Ill. 1990). As we read Rennie, however, it seems that the court limited its decision to the 30-day deadline stated in 29 C.F.R. §1613.214(a)(1)(i). Id. at 1062. As such, we are hesitant to simply hold that the 20-day appeal deadline is a statute of limitations on the strength of Rennie.

limitations, equitable tolling principles would apply. Id. The court stopped short, however, of finding whether the 20-day time limit was a statute of limitations or a jurisdictional prerequisite. Instead, the court found that, if the administrative deadline were jurisdictional, the plaintiff's complaint must be dismissed as she failed to meet it. Id. If, on the other hand, the administrative deadline were in the nature of a statute of limitations, the court stated that the plaintiff's complaint must be dismissed because she failed to state an equitable defense to her failure to comply on the face of her complaint. Id. Thus, the court reserved decision on the issue but found the district court properly dismissed the plaintiff's complaint in any event. While McGinty was an ADEA case, the court's bipartite

an ADEA case, the court's bipartite decision -- or, more aptly, refusal to decide -- offers us guidance here.

Obviously, if the 20-day appeal deadline were a jurisdictional prerequisite, plaintiff's complaint must be dismissed for lack of jurisdiction. This course, however, is less appealing than finding the deadline to be a statute of limitations for at lease two reasons. First, it is clear that the tide of case law is flowing in the direction of characterizing all administrative time limits as statutes of limitations subject to equitable tolling. See, Irwin v. Veterans Admin., 489 U.S. 89,--. 111 S.Ct 5453, 457 (1990); (30-day period in 42 U.S.C. § 2000e-16(c) for filing suit after EEOC decision in federal employment), Zipes, 455 U.S. at 398, 102 S.Ct. at 1135 (Title VII time limits in private sector);

Rennie, 896 F.2d at 1060-62, McGinty, 900 F.2d at 1118. We see no reason to accord any greater jurisdictional significance to the 20-day Title VII appeal limit that courts have attached to the limits applicable to filing Title VII charges. In addition, we note that, in dismissing an appeal for failure to comply with the 20-day limit, the EEOC issues the tardy plaintiff a right-to-sue letter. See supra at 6; McGinty, 900 F.2d at 1116. To hold that the 20-day limit is jurisdictional would render the right-to-sue letter meaningless, adding more confusion to the already complex EEOC administration process. See Mahasco Corp. v. Silver, 447 U.S. 807, 834, 100 S.Ct. 2486, 2501 (1986) (Blackmun, J., dissenting).

Characterizing the 20-day limit as a statute of limitations subject to

statute of limitations subject to equitable tolling, however, does not aid plaintiff's case. Courts that apply the principle of equitable tolling to cases such as this generally limit that applicability to two situations: (1) where the plaintiff had no knowledge, actually or constructively, of his rights; or (2) where the plaintiff was misled as to the nature of those rights by his adversary's conduct. Irwin v. Veterans Admin., 489 U.S. 89, --, 111 S.Ct. 453, 457-58 (1990); Jackson v. Richards Medical Co., 961 F.2d 575, 579-80 (6th Cir. 1992); Bracey v. Helene Curtis, Inc., 780 F.Supp. 568,570 (N.D.Ill. 1992). Here, plaintiff alleges that he was unable to file his EEOC appeal in a timely manner because he did know whether the transcript of his hearing had been corrected until after the deadline passed. (Amended Complaint, ¶8).

Plaintiff makes no claim that he was unaware of the deadline or that defendant's conduct -- or that of the EEOC, for that matter -- misled him as to the deadline. Under the regulations, a plaintiff has 20 days in which to notify the EEOC of his intent to appeal. 29 C.F.R. § 16113.233(a). Thereafter, the plaintiff has an additional 30 days in which to file supporting materials, such as statements or briefs. Id., Plaintiff was informed of these limitations along with the EEOC's decision in his case. We fail to see how plaintiff's concerns over the accuracy of the hearing transcript prevented him from meeting these deadlines. Accordingly, we find that plaintiff has not stated an excuse sufficient to allow for equitable tolling of 20-day deadline, and that his complaint

should be dismissed.[3]

III. CONCLUSION

For the foregoing reasons, it is hereby recommended that the plaintiff's complaint be dismissed for failure to comply with the applicable statute of limitations.

Respectfully submitted,

/s/ EDWARD A. BOBRICK
Edward A. Bobrick
United States Magistrate Judge

DATE: April 13, 1993

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[3] Although McGinty does not address the difference, treatment of Title VII's 20-day deadline for filing an administrative appeal as a statute of limitations rather than a jurisdictional prerequisite takes this matter outside the scope of defendant's 12(b)(1) motion. The court in McGinty, after discussing its alternating views, affirmed the district court's dismissal, which had been barred on lack of jurisdiction. Here, rather than recommended the granting of defendant's 12(b)(1) motion, we confine our recommendation to the dismissal of plaintiff's complaint.

Any objections to this Report and Recommendations must be filed with the Clerk of the Court within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. Thomas v. Arn, 474 U.S. 140 (1985); The Provident Bank v. Manor Steel Corp., 882 F.2d 258 (7th Cir. 1989).

Copies to:

Nathaniel White
P.O. Box 23201
Chicago, IL. 60623

James J. Kubik, AUSA
219 S. Dearborn St.
Suite 1200 Chicago,
IL. 60604

April 13, 1993: This date a copy of this Report and Recommendation was mailed to each of the above listed attorneys.

/s/ ROBERT A. CENTANO
Robert A. Centano
Courtroom Deputy

APPENDIX D
DISTRICT COURT ORDER - DISMISSAL

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

JUDGMENT IN A CIVIL CASE

Nathaniel White

V. CASE NUMBER 92 C 5633

Lloyd Bentsen

X Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff's objections to the Report and Recommendattion of Magistrate Judge Bobrick dated April 13, 1993 ("R&R") are

overruled. The R&R is adopted in its entirety. Defendant's motion to dismiss is granted. This case is dismissed with prejudice.

August 20, 1993
Date

H. STUART CUNNINGHAM
Clerk

/s/ Carol L. Wing
(By) Deputy Clerk Carol L. Wing

APPENDIX E

APPEALS ORDER - REHEARING DENIED

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 8, 1994

Before:

Hon. RICHARD A. POSNER, Chief Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

NATHANIEL WHITE,
Plaintiff - Appellant

No. 93-3545 v.

LLOYD BENTSEN,
Secretary of the Treasury,
Defendant - Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 92 C 5633,
James H. Alesia, Judge

Order

Plaintiff-Appellant filed a petition for rehearing and suggestion of rehearing en banc on August 12, 1994. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX F
EEOC DISMISSAL LETTER

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 19848
Washington, D.C. 20036

Nathaniel White, Appellant,	)	
v.	)	Appeal No. 01922270 Agency No. 903126
Nicholas F. Brady, Secretary, Department of the Treasury, Agency.	)	

DISMISSAL OF APPEAL

The record establishes that appellant sent a notice of appeal, postmarked April 8, 1992, to the Commission which appealed the agency's February 4, 1992 final decision (FAD) on appellant's discrimination complaint. The FAD was received by appellant on February 8, 1992.

According to EEOC Regulation 29 C.F.R. §1613.233, notices of appeal to the Commission must be filed within twenty

(20) calendar days after an appellant receives notice of the final agency decision, unless, based upon a written statement by the complainant, a showing is made that he or she was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his or her control prevented the filing of a Notice of Appeal within the prescribed time limit. Appeals are deemed filed on the date received by the Commission of the date the Notice of Appeal is postmarked. §1613.233(a).

Here, appellant was untimely in filing his appeal on April 8, 1992. However, appellant urges the Commission to waive the 20-day time limit in 29 C.F.R. §1613.233 because circumstances beyond his control prevented him from submitting the appeal in a timely manner. Specifically,

appellant claims that, after repeated attempts, he was unable to obtain the necessary information (an allegedly nonverbatim transcript) from the agency to support his appeal.

When appellant received his final decision from the agency, he was provided with appeal rights under 29 C.F.R. §1613.233. We note that this regulation specifies that a notice of appeal must filed within twenty days of receipt of a final decision, but that an appellant has thirty days to file statements in support of the appeal. Thus, under our regulations, appellant should have notified the Commission that he intended to appeal the agency's FAD within the 20-day time period even though he allegedly did not have all of the documents necessary to support the appeal at that time.

Appellant was properly informed by the agency of his appeal rights under our regulations. Accordingly, appellant's Notice of Appeal is untimely and is DISMISSED.

STATEMENT OF RIGHTS - ON APPEAL

RIGHT TO REQUEST REOPENING (MO391)

The Commission may, in its discretion, reopen an reconsider the decision in this case if the appellant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued; or
2. The previous decision involved an erroneous interpretation of law or regulation or misapplication of

established policy; or

3. The decision is of such exceptional nature as to have effects beyond the actual case at hand.

Requests to reopen, with supporting arguments or evidence, MUST BE FILED WITHIN THIRTY (30) CALENDAR DAYS of the date you receive this decision, or within twenty (20) calendar days of the date you receive a timely request to reopen filed by another party. Any argument in opposition to the request to reopen or cross request to reopen MUST be submitted to the Commission and to the requesting party WITHIN TWENTY (20) CALENDAR DAYS of the date you receive the request to reopen. See 29 C.F.R. §1613.235. All requests and arguments must bear proof of postmark and be submitted to the Director, Office of Federal Operations, Equal

Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reopen shall be deemed filed on the date it is received by the Commission.

RIGHT TO FILE A CIVIL ACTION (SO391)

You have the right to file a civil action in an appropriate United States District Court WITHIN THIRTY (30) CALENDAR DAYS of the date that you receive this decision, unless within that time you decide to file a request to reopen. The limitations period for filing a civil action under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621 et seq. (ADEA) may differ from the period set out for the filing of civil actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and the Rehabilitation Act of 1973, 29 U.S.C.

§791. You may be foreclosed from filing a civil action on any claim brought under the ADEA if you fail to file within the limitations period applied by the Court in the jurisdiction in which your action is filed. If you file a civil action, YOU MUST NAME AS THE DEFENDANT IN THE COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL NAME AND OFFICIAL TITLE. Failure to do so may result in the dismissal of your case. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (ZO391)

If you decide to file a civil action, and if you do not have or cannot afford the

services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action MUST BE FILED WITHIN THIRTY (30) CALENDAR DAYS of the date you receive the Commission's decision.

FOR THE COMMISSION:

JUL 06 1992 /S/ RONNIE BLUMENTHAL
Ronnie Blumenthal,
Director - Office of
Federal Operations

APPENDIX G
EXCERPT FROM EEOC ADMINISTRATIVE LAW JUDGE'S LETTER FOR HEARING

Chicago District Office
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
536 South Clark Street, Room 930A
Chicago, Illinois 60605
Telephone: 353-2713
Telecopier: 353-7355

March 26, 1991

Ms. Cherie L. Lindskog
Section Chief
Regional Complaints Center
Department of the Treasury
55 E. Monroe St. - Room 1535
Chicago, IL 60603

RE: EEO Complaint of Nathaniel White and Nicholas F. Brady, Secretary of the Treasury
EEOC # 210-91-3022X
TD # 90-3126

Dear Ms. Lindskog:

This is to notify both parties of the scheduling of the above captioned matter for hearing. PLEASE READ CAREFULLY.

The complaint has been assigned and scheduled for a pre-hearing conference and

for hearing as follows:

TIME: 9:00 am

DATE: June 11 and 12, 1991 (Tue. & Wed.)

PLACE: To be announced.

It is necessary for the requesting Federal Agrency to: .....

3. Arrange for a court reporter and notify him/her:

   a. as to the number of transcripts (including original) desired by the requesting Agency,

   b. that the bills are to be sent to the requesting Agency, and

   c. that all transcripts, original and copies, are to be sent directly by the court reporter to the EEOC Administrative Judge. .....

Arrangements for a court reporter to take a verbatim transcript of the hearing are the responsibility of the requesting Federal Agency, and all transcript costs

are assumed by that Agency. Contracts with court reporting firms should require delivery within 20 calendar days or less. The General Services Administration maintains a schedule of court reporters available to agencies and may be contacted directly for further information. .....

Sincerely,

/s/ Mary A. Pappas
Mary A. Pappas
Administrative Judge

cc/ Nathaniel White

Robyn R. Gilliam
Attorney, Office of Regional Counsel
Internal Revenue Service

APPENDIX H
LETTER FORM EEOC DISTRICT DIRECTOR

Chicago District Office
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
536 South Clark Street, Room 930A
Chicago, Illinois 60605
Telephone: 353-2713
Telecopier: 353-7355
TDD: (312) 353-2421

Certified Mail No.
P 366 450 591

December 2, 1991

Director
Department of the Treasury
Office of Equal Opportunity Programs
1500 Pennsylvania Ave., NW
Washington, D.C. 20220

RE: EEO Complaint of Nathaniel White and
Nicholas F. Brady, Secretary of the
Treasury
EEOC # 210-91-3022X
TD # 90-3126

Transmitted herewith is the original and two copies of the recommended decision in the discrimination complaint of the above referenced case. Also enclosed is the investigative file and the original and three copies of the hearing transcripts.

At the time of your final decision in this matter, a copy of this recommended decision, along with a copy of the verbatim transcript of the hearing must be forwarded to the Complainant, in accordance with 29 CFR 1613.221.

Sincerely,

/s/ JOHN P. ROWE
John P. Rowe
District Director

cc/ Nathaniel White

Robyn R. Gilliam
Attorney, Office of Regional Counsel
Internal Revenue Service

APPENDIX I

LETTER FROM U.S. TREASURY - DIRECTOR OFFICE OF EQUAL OPPORTUNITY PROGRAMS

DEPARTMENT OF THE TREASURY

WASHINGTON

DEC 11 1991

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Complaint of Nathaniel White and
Nicholas F. Brady, Secretary of the
Treasury
TD # 90-3126

Dear Mr. White:

Subject: EXCHANGE OF ADMINISTRATIVE JUDGE'S RECOMMENDED DECISION

In order to assure that the parties to a discrimination complaint have a full and fair opportunity to present their respective cases before the final decision is rendered, the Department of the Treasury has adopted a procedure whereby each side is to be offered an opportunity to review and comment upon the

recommendation made to the Department by the EEOC Administrative Judge who has conducted the hearing in the complaint. A copy of this material is being sent to the Complainant's representative (for the complainant, if unrepresented) and to the agency representative.

A copy of the recommended findings and decision of the Administrative Judge are enclosed. It should be noted that the Judge's recommendations are not final unless adopted by the Department as the final agency decision or no agency decision is issued within 60 days from receipt of the recommended decision.

On receipt of the Administrative Judge's recommendations, each side has an opportunity to comment on the analysis, findings and recommended decision. It is

also appropriate to comment on the hearing itself if either side believes that they were denied a full and fair opportunity to present their case. Under rare circumstances will OEOP reopen the record for the submission of additional evidence. In order to be considered, the written comments must be submitted to: Office of Equal Opportunity Program, Department of the Treasury, Washington, D.C. 20220,NOT LATER THAN 7 (SEVEN) CALENDAR DAYS FROM RECEIPT OF THE TRANSCRIPT AND RECOMMENDED DECISION.Failure to make a timely submissions will not stay the adjudication and final decision of the Department.

Sincerely,

/s/ RONALD A. GLASSER
Ronald A. Glasser
Director Office of Equal Opportunity Program

Nathaniel White, Pro Se
P.O. Box 23201
Chicago, IL 60623

Enclosure

APPENDIX J

PETITIONER'S RESPONSE TO: DIRECTOR -OEOP WASHINGTON, D.C.

Nathaniel White
P.O. Box 23201
Chicago, ILL. 60623

December 20, 1991

Department of the Treasury
Equal Employment Opportunity Program
C/O Ronald A. Glaser, Director
Washington, D.C. 20220

RE: EEO Complaint of Nathaniel White AND Nicholas F. Brady, Secretary of the Treasury

EEOC # 210-91-3022X
TD # 90-3126

Dear Director Glaser:

I Have reviewed the hearing transcript and the Administrative Judge's analysis, findings and recommended decision.

I do not believe that the hearing transcript is a verbatim record as required by 29 CFR 1613.218 (h). A

comparison of the original recording to the written transcript should be made, if at all possible, before the Agency issues a final decision.

I do not agree with the Administrative Judge's analysis and recommended decision for the following reasons:

A) **Assignment of duties:** The issue of whether away from home overnight travel is required or voluntary for employees is left unresolved and it is necessary to know in order to make a fair ruling. - Dorothy Hughes case assignments should not be used as a determining factor as the assignments came after the complaint was filed.

B) **Duty hours:** No comprehensive analysis was done by the investigator or hearing judge concerning credit hours worked in Group 1810. No comparison to actual time was ever made as suggested by the time keeper.

C) **Appraisals:** The Oct. 2, 1989 evaluation was written and sent for use by the Manager, Group 1810, on the same day. It gave no background information concerning my fraud experience whereas other managers of the other groups did give agent's background information which was used in the selection

process for Fraud Coordinator. The Servicewide Promotion Plan was not being followed by the District Personnel Office or management and I was not informed to update any SF-171 in the OPF. The same is true for the GS-13 Internal Revenue Agent selections.

D) **Working Conditions:** The Judge's decision doesn't appear to take into account the affidavits on file concerning the mentions of harassment in the group. Although she mentions their existence, she does not appear to give them any weight for the decision.

I also believe that more evidence should have been

allowed on the existing conditions of the commodity program through the use of the Regional Analyst Report issued early in 1990. Also, more evidence could have been obtained from witnesses that were not allowed to testify.

Sincerely,

Nathaniel White,
Complainant

(MAILED DEC. 20, 1991 - CERTIFIED RETURN RECEIPT REQUESTED P 366 218 746)

APPENDIX K

PETITIONER'S 2nd RESPONSE TO: DIRECTOR -OEOP WASHINGTON, D.C.

Nathaniel White
P.O. Box 23201
Chicago, ILL. 60623

January 16, 1992

Department of the Treasury
Equal Employment Opportunity Program
C/O Ronald A. Glaser, Director
Washington, D.C. 20220

RE: EEO Complaint of Nathaniel White AND Nicholas F. Brady, Secretary of the Treasury

EEOC # 210-91-3022X
TD # 90-3126

Dear Director Glaser:

In my December 20, 1991 letter replying to your letter dated December 11, 1991, I requested a comparison of the original recording of the hearing be made to the written hearing transcript prior

to the Agency issuing a final decision.

After further review of the hearing transcript, I am certain that the furnished hearing transcript is not a verbatim record as required by 29 CFR 1613.218(h). Therefore I am requesting your office return the transcript to the Chicago District Office-Equal Employment Opportunity Commission until a comparison of the original recording of the hearing can be made to the written hearing transcript and all necessary corrections made.

The hearing was recorded only by electronic tape recording and I would like to obtain a copy of the original electronic tape recording to make necessary corrections in the written hearing transcript.

Please advise me of your decision concerning this request as soon as possible.

Sincerely,

Nathaniel White,
Complainant

(MAILED JAN. 18, 1992 - CERTIFIED RETURN RECEIPT REQUESTED P 376 053 497)

APPENDIX L

PETITIONER'S 3rd RESPONSE TO: DIRECTOR -OEOP WASHINGTON, D.C. U.S. SENATOR PAUL SIMON'S LETTER

UNITED STATES SENATE
Washington, D.C. 20510-1302

January 28, 1992

Mr. Richard Hinkemeyer
Acting Director
Legislative Affairs Division
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20782

Dear Mr. Hinkemeyer:

I received the enclosed correspondence from my constituent, Nathaniel White, concerning his discrimination complaint. For a more detailed explanation, please see the attached information.

I would appreciate your looking into this matter and advising Deborah Pascal, staff assistant in my Chicago office, of your

findings as soon as possible.

Thank you for your cooperation and assistance.

My best wishes.

Cordially,

/s/ PAUL SIMON
Paul Simon
U.S. Senator

230 S. Dearborn (3892)
Chicago, Illinois 60604
(312) 353-4952

ps/djp
Enclosure

Nathaniel White
P.O. Box 23201
Chicago, ILL. 60623

January 16, 1992

Honorable Paul Simon
U.S. Senator
230 South Dearborn
Suite 3892
Chicago, ILL. 60604

RE: Equal Employment Opportunity
Treasury TD Case No. 90-3126
Nathaniel White v. Nicholas
F. Brady, Secretary of the
Treasury

Dear Senator Simon:

I am requesting that your office assist me in obtaining a written reply as soon as possible to my letter attached dated January 16, 1992 addressed to : Department of the Treasury *

I need to know what the decision is

regarding my request concering corrections of the hearing transcript as soon as possible.

Please request the Treasury Department to reply within seven days from recipt of your correspondence as the reply is urgently needed. (IF TREASURY COULD SEND A COPY TO ME AND YOUR OFFICE AS OF EVEN DATE, IT WOULD BE GREATLY APPRECIATED.)

* DEPARTMENT OF THE TREASURY EQUAL EMPLOYMENT OPPORTUNITY PROGRAM
C/O RONALD A. GLASER, DIRECTOR
1500 PENNSYLVANIA, AVENUE, N.W.
WASHINGTON, D.C. 20220

Thank You,

Nathaniel White

Nathaniel White
P.O. Box 23201
Chicago, ILL. 60623

January 16, 1992

Department of the Treasury Equal
Employment Opportunity Program
C/O Ronald A. Glaser, Director
Washington, D.C. 20220

RE: EEO Complaint of Nathaniel White AND
Nicholas F. Brady, Secretary of the
Treasury

EEOC # 210-91-3022X
TD # 90-3126

Dear Director Glaser:

In my December 20, 1991 letter replying to your letter dated December 11, 1991, I requested a comparison of the original recording of the hearing be made to the written hearing transcript prior to the Agency issuing a final decision.

After further review of the hearing transcript, I am certain that the

furnished hearing transcript is not a verbatim record as required by 29 CFR 1613.218(h). Therefore I am requesting your office return the transcript to the Chicago District Office-Equal Employment Opportunity Commission until a comparison of the original recording of the hearing can be made to the written hearing transcript and all necessary corrections made.

The hearing was recorded only by electronic tape recording and I would like to obtain a copy of the original electronic tape recording to make necessary corrections in the written hearing transcript.

Please advise me of your decision concerning this request as soon as possible.

Sincerely,

Nathaniel White,
Complainant

(MAILED JAN. 18, 1992 - CERTIFIED RETURN RECEIPT REQUESTED P 376 053 497)

APPENDIX M

EXCERPT FROM AGENCY DECISION LETTER

DEPARTMENT OF THE TREASURY

WASHINGTON

February 4, 1992

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Complaint of Nathaniel White and
Nicholas F. Brady, Secretary of the
Treasury TD Number 90-3126

Dear Mr. White:

Under the authority vested in me by the rules and regulations of the Treasury Department and the Equal Employment Opportunity Commission, I am rendering a decision on your complaint of sex and race discrimination. This letter constitutes the final decision by the Department of the Treasury on the complaint.

Based on the enclosed analysis and

findings, which are incorporated into this decision, I have determined that the evidence is not sufficient to support your claims of discrimination. Therefore, I am closing our file on this matter. Your appeal rights and a copy of the Administrative Judge's recommended decision are enclosed.

Sincerely,

/s/ CHARLENE J. ROBINSON
Charlene J. Robinson
Director
Human Resources Directorate

Mr. Nathaniel White
P.O. Box 23201
Chicago, IL 60623

Enclosures

cc: Mary Pappas, AJ
EEOC District Office
536 S. Clark St., Suite 950
Chicago, IL 60605

Robyn Gilliom, Esq.
IRS Office of Regional Counsel
230 S. Dearborn St., Suite 3410
Chicago, IL 60604

Chicago Regional Complaints Center

IRS Bureau EEO Officer

(EXCERPT FROM ANALYSIS & FINDINGS)

Discrimination Complaint of:
Nathaniel White and Nicholas F. Brady,
Secretary of the Treasury

TD Case Number: 90-3126

INTRODUCTION:

.....The complainant was dissatisfied with the proposed disposition and requested a hearing, to be held before an EEOC Administrative Judge. The hearing occurred on June 11 and 12, 1991. The Department of the Treasury received the AJ's recommended decision on December 9, 1991. The parties were given an opportunity to submit comments on the Administrative Judge's recommended decision. The Internal Revenue Service counsel submitted comments urging adoption of the AJ's analysis and

recommended decision. The complainant, disagreeing with the AJ's analysis and recommended decision, submitted comments concerning the weight given certain evidence by the Administrative Judge. These comments have been considered in reaching this final agency decision.....

DECISION:

It is the final decision of the Department of the Treasury that the evidence of record is not sufficient to support complainant's claims of discrimination based on sex and race. An award of attorney's fees and costs is not appropriate.

APPEAL RIGHTS:

(attached)

APPENDIX N

LETTER FROM:DIRECTOR - OEOP WASHINGTON

DEPARTMENT OF THE TREASURY

WASHINGTON

FEB 27 1992

Dear Mr. White:

This is in reply to your request for a copy of the tape recording from which the transcript of the hearing on your discrimination complaint (TD number 90-3126) was made.

The EEOC regulations only require that a verbatim transcript be provided when a hearing is held. Consequently, the Department does not contract for an audio tape of the hearing but only a typed transcript. The Treasury Department does not have a tape recording of the hearing.

Even if the Department did have a

recording of the hearing, you have not provided any basis on which we should supply it to you. Although you allege that the hearing transcript is not a verbatim record of the hearing, you have cited no specific example of where the transcript is incorrect. More importantly, you have not alleged that any errors in the transcript have a material effect on the case. Absent any evidence that the transcript is so defective as to effect the outcome of the case in any material respect, the Department will not pursue your request for a copy of the tape recording. Neither the Administrative Judge or the Bureau attorney noted any serious defects in the transcript.

In light of the fact that the Administrative Judge forwarded the

transcript to the Department with the recommended decision and without any comments on the transcript's accuracy, the Department assumes that EEOC is satisfied that the Department has fulfilled its obligation of providing a verbatim transcript of the hearing. Should you wish to pursue this matter further, you should raise the issue with EEOC if you choose to appeal the final agency decision on your complaint.

Sincerely,

/s/ RONALD A. GLASER
Ronald A. Glaser
Director
Office of Equal Opportunity Program

Mr. Nathaniel White
P.O. Box 23201
Chicago, IL 60623

APPENDIX O

LETTER FROM IRS REGIONAL ATTORNEY

REGIONAL COUNSEL
Internal Revenue Service
Midwest Region
230 South Dearborn
Suite 3410
Chicago, Illinois 60604
(312) 886-5810
(FTS) 886-5810
(FAX) 886-8290

CC:MW:GLS-70-91
RRGilliom
March 18, 1992

Nathaniel White
P.O. Box 23201
Chicago, IL 60623

In re: Discrimination Complaint of Nathaniel White v. Nicholas F. Brady, Secretary of the Treasury
EEOC Case No. 210-91-3022X, TD Case NO. 90-3126

Dear Mr. White:

Enclosed you will find the agency documents related to the procurement of court reporter services for the hearing in your discrimination complaint referenced above. As you can see, the purchase order only provided for the

delivery of transcripts of the hearing to the administrative judge. There is no provision for the agency to receive a copy of the audio tape or for the court reporter to maintain the audio tape for later review.

I hope that this answers your questions regarding the agency's procurement of the services of the court reporter. Please feel free to contact me if you have any further questions regarding this matter.

Sincerely,

/s/ ROBYN R. GILLIOM
Robyn R. Gilliom
Senior Attorney
General Legal Services

Attachment

(2)

Supreme Court, U.S.
FILED
MAR 8 - 1995
OFFICE OF THE CLERK

No. 94-1004

In the Supreme Court of the United States

OCTOBER TERM, 1994

NATHANIEL WHITE, PETITIONER

v.

ROBERT RUBIN, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARLEIGH DOVER
SUSAN M. SLEATER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

11 pp

QUESTION PRESENTED

Whether the court of appeals correctly ruled that equitable principles did not excuse petitioner's failure to file a notice of appeal with the EEOC within 20 days of receiving notice of the agency's final decision denying his claims of employment discrimination based on race and sex.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 31 F.3d 474. The district court's order (Pet. App. D1-D2) and the magistrate's recommendation (Pet. App. C1-C22) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1994. A petition for rehearing was denied on September 8, 1994. Pet. App. E1-E2. The petition for a writ of certiorari was filed on December 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, an agent for the Department of the Treasury, Internal Revenue Service (the agency), filed an administrative complaint under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that his race and sex were improperly considered in agency employment practices,[1] and that he failed to receive a promotion to a higher grade because of the alleged discriminatory conduct. Pet. 6-9. Petitioner received a hearing before an Equal Employment Opportunity Commission (EEOC) administrative judge (AJ) on June 11 and 12, 1991. The AJ concluded that petitioner's claim was unfounded. Pet. App. A1.

2. Before issuing a final decision, the agency sent petitioner the transcript of the proceedings, the AJ's recommended decision, and a written request that petitioner review those documents and comment, if he so desired, on the recommendation within seven days from the date he received the materials. Pet. 14-15; Pet. App. I1-I3. Within the allotted time, petitioner notified the agency that he did not believe the hearing transcript was a verbatim record of the proceedings as required by 29 C.F.R. 1613.218(h), and asked the agency to compare the transcript to the original recording of the proceedings before it issued a final decision. Pet. App. J1-J2. Petitioner also listed several bases on which he disagreed with the AJ's recommendation. *Id.* at J2-J5.[2] Petitioner

---

[1] Petitioner, a black male, claimed that his immediate supervisor, an Asian-American female, discriminated against him with respect to assignment of duties, duty hours, evaluations, and working environment. Pet. 6-9.

[2] None of the disagreements with the AJ's decision mentioned by petitioner in his letter of December 20, 1991, were related to his allegation that the transcript was not verbatim. Petitioner did not

wrote another letter to the agency on January 16, 1992, requesting the "electronic tape recording" of the proceedings and reiterating his request for a comparison between the transcript and the original recording. *Id.* at K1-K3.[3]

3. On February 4, 1992, the agency adopted the AJ's recommendation and issued a final agency decision denying petitioner's employment discrimination claim. The agency noted that, in reaching its decision, it had considered the comments submitted by petitioner regarding the AJ's decision. Pet. App. M4. Petitioner received notice of the agency's final decision on February 8, 1992. In accordance with 29 C.F.R. 1613.221(b)(1) and (2), that notice included a copy of the AJ's recommendation and a statement informing petitioner of his right to seek review of the agency's decision pursuant to 29 C.F.R. 1613.233. Pet. 18; Pet. App. M1-M4. The appeal-rights notice included an excerpt from 29 C.F.R. 1613.233, which provides that review of an agency decision can be obtained by filing suit in a district court within 90 days of petitioner's receipt of notice of the agency's final decision, or by filing a notice of appeal

---

describe specific transcript inaccuracies at that time and has yet to do so.

[3] Petitioner received a written response to his January 16 request for a copy of the audio tape and a review of the transcript on March 2, 1992. The agency informed petitioner that it did not contract for audio tapes of hearings and could not fulfill petitioner's request. Pet. App. N1. The agency went on to note that, in any event, petitioner had failed to cite any specific inaccuracies in the transcript and had failed to allege any errors that would have a material effect on the case. The agency also informed petitioner that he was free to raise the issue with the EEOC if he chose to pursue an appeal from the final agency decision. *Id.* at N2-N3.

with the EEOC within 20 days after receipt of that notice. See 42 U.S.C. 2000e-16(c) (Supp. V 1993); 29 C.F.R. 1613.233(a); see also Pet. App. A2.

4. Petitioner appealed the agency's final decision to the EEOC on April 8, 1992, 60 days after he received notice of that decision. Pet. 35-36. Because petitioner was required to file a notice of appeal with the EEOC within 20 days, the EEOC dismissed that appeal as untimely. Pet. App. A2. On August 21, 1992, petitioner filed suit in the United States District Court for the Northern District of Illinois, seeking review of the EEOC's decision. *Id.* at C10. The matter was referred to a magistrate who recommended that the EEOC's dismissal be affirmed. *Id.* at C20-C21. The district court overruled petitioner's objections to the magistrate's report, adopted the magistrate's recommendation that the appeal to the EEOC was untimely, and dismissed petitioner's action. *Id.* at D1-D2.

5. The court of appeals held that the regulatory time limit for filing an administrative appeal to the EEOC set out in 29 C.F.R. 1613.233(a) was not jurisdictional, but rather, like a statute of limitations, was subject to equitable tolling and estoppel. Pet. App. A2-A3. Rejecting petitioner's argument that his delay in filing was justified by his need to investigate inaccuracies in the transcript, the court concluded that "[t]he standard grounds of equitable tolling and estoppel" were absent in petitioner's case. *Id.* at A4. The court found that petitioner

> was well aware of the time available and able to act within that bound. * * * [Petitioner] does not contend that the IRS misled him in any way about the applicable deadlines or prevented him from initiating the process before the EEOC. * * * [He]

> was told exactly what to do and when to do it. One who decides to follow a schedule of his own devising, for reasons of his own invention, has no legitimate complaint when the tribunal adheres to the rules.

Id. at A3-A4.

ARGUMENT

Petitioner received notice of the agency's final decision denying relief on his discrimination claim on February 8, 1992. That notice included information about petitioner's right to appeal from the agency's final decision. Pet. 33; Pet. App. C5-C7, M2-M4. Petitioner was consequently informed that, in order to appeal the agency's decision to the EEOC, he had to submit a notice of appeal in writing within 20 days of February 8, 1992. Petitioner did not submit such a notice of appeal until April 8, 1992, 60 days after he received the agency's final decision. Pet. 35-36. Petitioner's appeal was therefore untimely pursuant to 29 C.F.R. 1613.233(a).[4]

The EEOC may exercise its discretion to extend the time for filing an appeal if a complainant shows grounds for applying the doctrine of equitable estoppel. See *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 93 (1990) (holding time limits specified in 42 U.S.C. 2000e-16(c) (Supp. V 1993) for commencing civil actions are subject to equitable tolling). The applicable regulations allow the EEOC to accept an otherwise untimely appeal

---

[4] Section 1613.233(a) provides, in pertinent part: "Except as provided in paragraph (c) of this section, a complainant may file a notice of appeal at any time up to 20 calendar days after receipt of the agency's notice of final decision on his or her complaint. An appeal shall be deemed filed on the date it is postmarked * * *. Any statement or brief in support of the appeal must be submitted to the Commission and to the defendant agency within 30 calendar days of filing the notice of appeal."

"based upon a written statement by the complainant showing that * * * circumstances beyond his or her control prevented the filing of a Notice of Appeal within the prescribed time limit." 29 C.F.R. 1613.233(c); see *Rao* v. *Baker*, 898 F.2d 191, 198 (D.C. Cir. 1990).

Petitioner concedes that he was aware of the 20-day filing period but contends that circumstances beyond his control prevented him from filing a timely notice of appeal. Pet. App. F2. When petitioner filed a notice of appeal with the EEOC on April 8, he argued that "a non-verbatim transcript had been used in making [the agency's final decision]," explained the circumstances surrounding his tardiness in filing, and requested an extension of the filing period. Pet. 36.

Before the EEOC, petitioner claimed that, despite repeated attempts, he was unable to obtain a verbatim transcript from the agency to support his appeal and that he was unable to proceed without the supporting documentation. Section 1613.233, however, allows petitioner 20 days to file a notice of appeal and an additional 30 days to file supporting materials. Petitioner's alleged inability to obtain an "accurate" transcript from the agency by February 28, 1992, did not prevent him from notifying the EEOC of his intent to appeal the agency's decision by that date.[5] As this Court noted in *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 151 (1984), "[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."

---

[5] The EEOC held that, under the regulations, petitioner "should have notified the Commission that he intended to appeal the agency's [final decision] within the 20-day time period even though he allegedly did not have all of the documents necessary to support the appeal at that time." Pet. App. F3.

Petitioner contends that the agency committed "affirmative misconduct" by leading him to believe that its final decision was based on an accurate transcript, Pet. 30, 37, 45-49, and by failing to inform him otherwise until the 20-day filing period had expired, Pet. 34-35, 38, 44, 54, 64. He argues that such misconduct justified an extension of the filing period. Petitioner claims that, had the agency's final decision been based on a review of an accurate transcript, he would not have appealed the dismissal of his case. Pet. 47.

Petitioner received the transcripts of the proceedings before the AJ on December 13, 1991. As of February 28, 1992, the last day of the 20-day filing period, petitioner had the following information: (1) He believed that the transcripts he received from the agency on December 13, 1991, were inaccurate; (2) he knew that the agency had rendered its final decision in reliance upon the transcripts of the proceedings before the AJ; (3) the agency's final decision did not mention or address petitioner's concerns regarding the accuracy of the transcripts (Pet. 29); (4) he knew that, although he had written three letters, he had not received a response from the agency to his concerns regarding the inaccuracies he perceived in the transcripts (Pet. 31-33); (5) he knew that the two people who transcribed and recorded the proceedings before the AJ were not licensed as court reporters by the State of Illinois (Pet. 17, 25); and (6) he knew that he had only 20 days from February 8, 1992, to file a notice of appeal.

As the court of appeals noted, "[e]rrors in the transcript are reasons to appeal, not reasons to delay appeals." Pet. App. A3. The fact that petitioner was "still gathering details" and collecting evidence to substantiate his claims regarding the inaccuracy of the transcripts did

not prevent him from filing a timely notice of appeal. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARLEIGH DOVER
SUSAN M. SLEATER
Attorneys

MARCH 1995

Supreme Court, U.S.
FILED
MAR 16 1995
OFFICE OF THE CLERK

NO. 94-1004

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NATHANIEL WHITE,
PETITIONER

V.

ROBERT E. RUBIN, AS
SECRETARY OF THE U.S. DEPARTMENT
OF THE TREASURY,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

NATHANIEL WHITE
PETITIONER - "PRO SE"
P.O. BOX 23201
CHICAGO, ILLINOIS 60623
(NO PHONE)

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==========

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

==========

PETITIONER'S REPLY BRIEF

==========

PURPOSE OF PETITIONER'S REPLY BRIEF

Petitioner makes this reply to conform with Supreme Court Rule 15.6 - "A reply brief addressed to arguments first raised in the brief in opposition may be filed by any petitioner,..."

PETITIONER'S ARGUMENT

I. RESPONDENT'S PREVIOUS ARGUMENTS

Previously, respondent's arguments had been the following:

A. RESPONDENT'S ARGUMENT BEFORE EEOC:

On June 2, 1992, IRS Regional Counsel, Dennis J. Conlon, and IRS Senior Attorney, Robyn R. Gillion via and thru Office of Equal Opportunity Programs - Director, Ronald A. Glasser forwarded to Equal Employment Opportunity Commission (to Ms. Dolores Rozzi - Director, Office of Review and Appeals) the Agency Response To Appeal citing the following argument:

****

"The Appellant did not file his

notice of appeal until April 8, 1992, which was far beyond the prescribed period. He alleges that his filing period should be extended under 29 CFR §1613.233(c) because he was prevented from filing timely by circumstances beyond his control, specifically, that the Agency concealed its hiring of incompetent personnel to record the hearing by deceptively referring to the personnel as court reporters. However, his own letters to the Director of OEOP show that he reviewed the transcripts and that he believed that they were not verbatim before he received the FAD. Therefore, he had all the knowledge that he needed for filing an appeal well before the 20-day time limit began to run. The Agency accordingly takes the position that the time period for filing

a notice of appeal should not be extended under 29 CFR §1613.233(c)." (See Appen. P; U.S. Dist. Crt. Exh -D)

****

Thus respondent stated that petitioner should have filed appeal based upon a review of the transcripts and his belief that they were not verbatim. This argument was contrary to court interpretation of "prevented by circumstances beyond his control" within the EEOC regulations. A person is "prevented by circumstances beyond his control" for submitting a discrimination charge until the time when "facts that would support a charge of discrimination under Title VII were apparent to a person with reasonably prudent regard for his rights similarly situated to the plaintiff." Wolfolk v. Rivera, 729 F.2d

1114, at 1117, (7th Cir. 1984). The argument was not used in U.S. District Court or U.S. Court of Appeals by respondent.

B. RESPONDENT'S ARGUMENT BEFORE U.S. DISTRICT COURT:

During the period August 21, 1992 through August 20, 1993, before U.S. District Court, respondent argued in a Fed. R. Civ. P. 12(b)(1) motion that 29 CFR §1613.233(a) is jurisdictional and should not be treated as a statute of limitations allowing principles of equity to be invoked for petitioner's late filing to EEOC on April 8, 1992.

****

" The parties central dispute herein is whether the twenty-day limit for filing an EEOC appeal is a jurisdictional

requirement of a statute of limitations." (See Pet. App. C-12.)

Honorable Magistrate Judge Bobrick wrote "Here rather than recommend the granting of defendant's 12(b)(1) motion, we confine our recommendation to the dismissal of plaintiff's complaint." (See Pet. App. C-21 - footnote.)

****

However, Honorable Judge Alesia, U.S. District Judge, wrote in his Order dated August 23, 1993, "... The R&R (Magistrate's Report) is adopted in its entirety. Defendant's motion to dismiss is granted." (See Pet. App. D-2.) Thus Respondent's 12(b)(1) motion was left with its final disposition unclear as no court opinion was written by the U.S. District Judge.

C. RESPONDENT'S ARGUMENT BEFORE U.S. COURT OF APPEALS:

During the period October 18, 1993 through July 29, 1994, before the U.S. Court of Appeals (7th Cir.), respondent reiterated the Fed. R. Civ. P. 12(b)(1) motion for jurisdictional bar of consideration of petitioner's appeal. The U.S. Court of Appeals in its opinion explained away respondent's 12(b)(1) motion argument stating such argument should be settled based upon the trend of case law, and that 29 CFR §1613.233(a) was clearly a statute of limitations and not jurisdictional.

II. RESPONDENT'S NEW ARGUMENT BEFORE U.S. SUPREME COURT:

Now, after writing a Question Presented, and case Statement to exclude

consideration of the Agency's actions of "affirmative misconduct" in Respondent's Opposition Brief, respondent argues by summarizing a new argument. (See Brief of the Respondent in Opposition ("BRO") pg (I) and pgs 2-5.)

Respondent's new argument can be summed up as follows: (Parts 1 & 2)

PART 1: (BRO. 7)

****

"Petitioner received the the transcripts of the proceedings before the AJ on December 13, 1991. As of February 28, 1992, the last day of the 20-day filing period, petitioner had the following information: (1) He believed that the transcripts he received from the agency on December 13, 1991, were

inaccurate; (2) he knew that the agency had rendered its final decision in reliance upon the transcripts of the proceedings before the AJ; (3) the agency's final decision did not mention or address petitioner's concerns regarding the accuracy of the transcripts (Pet.29); (4) he knew that, although he had written three letters, he had not received a response from the agency to his concerns regarding the inaccuracies he perceived in the transcripts (Pet.31-33); (5) he knew that the two people who transcribed and recorded the proceedings before the AJ were not licensed as court reporters by the State of Illinois (Pet. 17, 25); and (6) he knew that he had only 20 days from February 8, 1992, to file a notice of appeal."

****

In Part 1 of respondent's argument, item nos. (1), (2), (3), (4), and (5) are fallacious for the following reasons: As of February 28, 1992, petitioner knew the following: (1) On March 26, 1991, AJ had ordered the Agency to hire court reporters (Pet. App. G); (2) On June 11 & 12, 1991, AJ held EEOC administrative hearing with Agency's hired court reporter to record the hearing; (3) On December 2, 1991, EEOC District Director, John Rowe via letter informed petitioner that, "... the original and three copies of the hearing transcripts." were mailed to DIR-Office of Equal Opportunity Programs ("OEOP") Washington, D.C. (Ronald Glasser's office) (Pet. App.H); (4) On December 13, 1991, petitioner received a

non-verbatim hearing transcript along with a letter from DIR-OEOP, stating a reply to his office was necessary for any comments to be considered concerning the hearing, stating it would assure that parties have a full and fair opportunity to present their respective cases. (Pet. App. I); (5) On December 26, 1992, January 22, 1991 and sometime after January 28, 1992, DIR-OEOP received letters stating that the transcript was not verbatim as required by 29 CFR §1613. 218(h) and should be corrected before making the final agency decision (FAD) (Pet. App. J, K, & L); (6) On February 3, 1992, petitioner received certifications from Dept. of Professional Regulations - State of Illinois, stating neither of the two women hired by the Agency was listed on

their roster as being licensed by Illinois. Petitioner knew this evidence was not concrete as last names could have been changed due to marriage. (See Pet. 47); (7) On February 8, 1992, petitioner received the FAD from Treasury Dept., Washington, D.C. stating that EEOC and Treasury rules and regulations had been authority used in making the decision and that comments from petitioner had been received and entered into making of the final decision. (Pet. APP. M) Due to the letter, petitioner had no reason to believe that a final decision was made without correcting the transcript as of February 28, 1992.; (8) As of February 28, 1992, petitioner knew of no official of the U.S. Government misinforming him about the administrative processing of

the EEO complaint and thought that the State of Illinois certification was an error or fallacious since the AJ had allowed the woman at hearing to perform as a court reporter and the Agency had hired them as court reporters.

Only item (6) in Part 1 of respondents argument is factual. Although petitioner knew about the 20-day deadline, he had no reason to file appeal anywhere during that period. (See Pet. 47)

PART 2. (BRO 6-7)

Respondent further states in the new argument:

****

"Before the EEOC, petitioner claimed that, despite repeated attempts, he was unable to obtain a verbatim

transcript from the agency to support his appeal and that he was unable to proceed without the supporting documentation. Section 1613.233, however allows petitioner 20 days to file a notice of appeal and an additional 30 days to file supporting materials. Petitioner's alleged inability to obtain an "accurate" transcript from the agency by February 28, 1992, did not prevent him from notifying the EEOC of his intent to appeal the agency's decision by that date. <The EEOC held that, under the regulations, petitioner "should have notified the Commission that he intended to appeal the agency's (final decision) within the 20-day time period even though he allegedly did not have all of the documents necessary to support the appeal at that time." Pet. App F3.> As

this Court noted in Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984), "(o)ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence."

Petitioner contends that the agency committed "affirmative misconduct" by leading him to believe that its final decision was based on an accurate transcript, Pet. 30, 37, 45-49, and by failing to inform him otherwise until the 20-day filing period had expired, Pet. 34-35, 38, 44, 54, 64. He argues that such misconduct justified an extention of the filing period. Petitioner claims that, had the agency's final decision been based on a review of an accurate transcript, he would not have appealed the dismissal of his

case."

****

Respondent's argument in Part 2 is erroneous for the following reasons: (1) Petitioner argued before the EEOC under 29 CFR §1613.233(c) ..." that circumstances beyond his control prevented the filing of a Notice of Appeal within the prescribed time limit.." with basis of appeal being violation of 29 CFR §1613.218(h) - "The hearing shall be recorded and transcribed verbatim." (See Appen. Q and U.S. Dist. Court Complaint, Exh-B, pgs. 1-3); (2) Petitioner alleged that the Agency committed "affirmative misconduct" for its actions contrary to Equal Employment Opportunity Commission's Regulations, which included misrepresentation, deception, and

concealment. (See Pet. 23-35, 45 for petitioner's reasons for "affirmative misconduct".)

****

Respondent's new argument is an attempt to state, "Petitioner had enough facts as of February 28, 1992, was not diligent, and should have filed notice of appeal with EEOC timely. Therefore equity principles should not be invoked for petitioner to seek merits of his EEO complaint." ***** However, since the record of this case details the Agency's misrepresentation, deception, and concealment of facts which would have prompted petitioner to file a timely appeal notice to EEOC, respondent's new argument is groundless. The record also reflect petitioner's diligence. Neither the EEOC or courts, District or Appeals,

dismissed this case based upon lack of petitioner's diligence. The case was dismissed in all instances without consideration of respondent's actions which constituted "affirmative misconduct", for petitioner filing late notice of appeal to EEOC. It has long been a principle of this court that, " Where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of statute of limitations does not begin to run until the fraud is discovered, though there may be no special circumstances or efforts on part of party committing fraud to conceal it from other party." Holmberg v. Armbrecht 66 S.Ct. 582 at 585 (1946). "A corollary of this principle, often found in cases

where wrongful concealment of facts is alleged, is that a party responsible for such wrongful concealment is estopped from asserting the statute of limitations as a defense. Mr. Justice Black gave a classic statement of this corollary in Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, at 232-33 (1959): "... no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases both law and equity courts and has frequently been employed to bar inequitable reliance on statute of limitations". Reeb v. Econnomic Opportunity Atlanta. Inc., 516 F.2d 924, at 930 (5th Cir. 1975). Since petitioner discovered the misrepresentation and concealment with

respect to preparation of the non verbatim transcript on March 31, 1992, the time for appeal to EEOC under 29 CFR §1613.218(h) should begin running on April 1, 1992 and end April 20, 1992. Petitioner's appeal to EEOC on April 8, 1992 should be accepted as timely under principles of equity of this court.

CONCLUSION

For the previously stated reasons in Petition For A Writ Of Certiorari, (filed Dec. 5, 1994), and foregoing reasons, petition for a writ of certiorari should be granted.

Dated: March 14, 1995

Respectfully submitted,

Nathaniel White
Petitioner - "PRO SE"
P.O. Box 23201
Chicago, ILL. 60623

EXHIBIT - P
AGENCY RESPONSE TO APPEAL

DEPARTMENT OF THE TREASURY

WASHINGTON

JUN 02 1992

RE: Complaint of Nathaniel White and
Nicholas F. Brady, Secretary of the
Department of the Treasury
TD Number 90 -3126
Appeal Docket No.: 01922270

Dear Ms. Rozzi:

Enclosed, as required, are the following items indicated by an "X" for the above cited appeal:

●X● Agency Comments

If you have any questions regarding this matter, please contact Lisa Jones of my staff at 343-9075.

Sincerely,

/s/ Ronald A. Glasser
Ronald A. Glasser
Director
Office of Equal
Opportunity Program

Ms. Dolores Rozzi, Director
Office of Review and Appeals
Equal Employment Opportunity
Commission
P.O. Box 19848
Washington, D.C. 20036

Enclosure

cc: Robyn R. Gilliom
Nathaniel White

BEFORE THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OFFICE OF FEDERAL OPERATIONS

Nathaniel White, Appellant,	OFO Docket No. 01922270
v.	TD Case No. 90-3126
Department of the Treasury, Agency.	

AGENCY RESPONSE TO APPEAL

I. INTRODUCTION

The appellant is employed by the Internal Revenue Service as a GS-12 revenue agent. He alleges discrimination based on race and sex in a continuing pattern of harassment by his immediate supervisor. His complaint was heard by an EEOC Administrative Judge on June 11 and 12, 1991, who issued a recommended decision on November 6, 1991. The recommended decision was transmitted to the Office

of Equal Opportunity Programs (OEOP), Department of the Treasury, on December 2, 1991, along with the investigative file and the original and three copies of the hearing transcripts.

On December 11, 1991, OEOP mailed a copy of the hearing transcript and decision to both the Appellant and the Agency's representative. Both parties were given seven calendar days from receipt of the transcript and recommended decision to comment on the analysis, findings and recommended decision. Both parties were also advised that it would be appropriate to comment of the hearing itself if either side believed that they were denied a full and fair opportunity to present their case. The Appellant's admits that

he received these materials on December 13, 1991. He submitted his comments to OEOP on December 20, 1991.

On February 4, 1992, the Department of the Treasury rendered a final agency decision (FAD) finding that the evidence was not sufficient to support the Appellant's claims of discrimination based on race and sex. Enclosed with the FAD were the Appellant's appeal rights. The Appellant received his copy on February 8, 1992.

The Appellant filed his instant appeal on April 3, 1992. He alleges that the Agency did not hire competent personnel to produce a verbatim record or transcript of the hearing as required by 29CFR §1613.218(h). He requests that the Commission rescind the FAD and issue a ruling by default in his favor. He

further alleges that he was unable to file timely appeal "due to gathering concrete evidence to substantiate the basis for appeal."

II. FACTS

On April 19, 1991, the Agency issued a purchase order to AIM Reporting Service for the services of a court reporter to record the proceedings of an EEOC hearing on June 11 and 12, 1991. The Agency instructed the vendor to supply an original and three copies of the transcript to the EEOC Administrative Judge within two weeks of the hearing. The hearing was held on June 11 and 12, 1991, and the transcripts from both days were certified by Anne I. Maziorka, Notary Public, on June 26, 1991.

III. ISSUES

Whether the time limit for filing a notice of appeal should be extended because circumstances beyond the Appellant's control prevented him from filing his notice of appeal within 20 days after receipt of the FAD.

Whether the FAD should be ordered rescinded and a ruling entered in favor of the Appellant due to the Agency's alleged procurement of unqualified personnel to prepare a verbatim record of the hearing held on June 11 and 12, 1991, before the Administrative Judge.

IV. ANALYSIS

A. Timeliness

The Appellant admits in his notice of appeal that he received the transcripts on December 13, 1991. On

December 20, 1991, he wrote to the Director of OEOP, Ronald A. Glasser, that he did not believe that the hearing transcript was a verbatim record as required by 29 CFR §1613.218(h). On January 16, 1992, he again wrote to Mr. Glasser that he was "certain" that the furnished hearing transcript was not a verbatim record.

The Appellant thereafter received the FAD on February 8, 1992. At that time he was advised that an appeal to EEOC had to be submitted within twenty (20) calendar days of the date he received the FAD. Therefore, his appeal to the FAD should have been submitted by February 28, 1992.

The Appellant did not file his notice of appeal until April 8, 1992,

which was far beyond the priscribed period. He alleges that his filing period should be extended under 29 CFR §1613.233(c) because he was prevented from filing timely by circumstances beyond his control, specifically, that the Agency concealed its hiring of incompetent personnel to record the hearing by deceptively referring to the personnel as court reporters. However, his own letters to the Director of OEOP show that he had reviewed the transcripts and that he believed that they were not verbatim before he received the FAD. Therefore, he had all of the knowledge that he needed for filing an appeal well before the 20-day time limit even began to run. The Agency accordingly takes the position

that the time period for filing a notice of appeal should not be extended under 29 CFR §1613.233(c).

B. MERITS

The Appellant alleges that the Agency hired incompetent personnel to record and transcribe the hearing. His evidence consists of a certification from the Illinois Department of Professional Regulation that the transcription service hired by the Agency did not use reporters licensed under the Illinois Certified Shorthand Reporters Act of 1984. However, the State of Illinois does not require electronic sound reporters to be licensed. Furthermore, the EEOC regulations do not contain any requirement that the Agency procure a

licensed shorthand reporter. The federal statute cited by the Appellant refers to United States district courts, not administrative hearing before the EEOC. Therefore, the Appellant has not produced any evidence that the reporting service contracted by the Agency was not qualified to prepare a verbatim record of the hearing as required by 29 CFR §1613.218(h).

Finally, the Appellant has not cited a single example of testimony in the transcript which he believes was incorrectly transcribed, nor has he cited any specific error in the Administrative Judge's recommended decision that was caused by an inaccurate transcription of the testimony. Therefore, even if errors do

exist in the transcript, he has not demonstrated that any harm resulted from such alleged errors.

V. CONCLUSION

Based upon the foregoing, the Agency requests that the Commission dismiss the Appellant's appeal as untimely filed and affirm the final agency decision on its merits.

Respectfully submitted,

DENNIS J. CONLON
Regional Counsel

by: /s/ Robyn R. Gilliom
ROBYN R. GILLIOM
Senior Attorney, GLS

APPENDIX - Q
PETITIONER'S APPEAL LETTER TO EEOC

Nathaniel White
P.O. Box 23201
Chicago, ILL. 60623

April 8, 1992

Director Office of Federal Operations
Equal Employment Opportunity Commission
1801 L Street, N.W., Suite 5000
P.O. Box 19848
Washington, D.C. 20036

RE: Complaint of Nathaniel White and Nicholas F. Brady, Secretary of the Treasury
TD Number 90-3126
EEOC Number 210- 91-3022X

Dear Director:

This letter is to serve as a request for appeal of the above referenced case under 29 CFR Section 1612.233 (c) ... "that circumstances beyond his or her control prevented the filing of a Notice of Appeal within the prescribed time limit...". I did receive a final

decision from the Department of the Treasury on February 8, 1992. However, due to gathering concrete evidence to substantiate the basis for appeal, no timely appeal could be made prior to this date. The basis for appeal is that a violation of 29 CFR Section 1613.218 (h)-Record of Hearing was made by the U.S. Treasury/ Internal Revenue Service (Agency). The CFR Section requires that the hearing shall be recorded and transcribed verbatim. The transcript, produced by personnel hired by the Agency, was not verbatim and contained wide discrepancies of actual hearing testimonies. The fact that the Agency hired incompetent personnel to record and transcribe the hearing was concealed from me through deception of referring to the personnel as court reporters.

There were two people involved in recording the hearing, one to record by electronic audio tape recorder and another to transcribe that taped recording. Neither one of the people hired were Official Court Reporters. Without the actual verbatim testimonies, no valid and proper analysis could have been performed by the Administrative Judge and no valid and proper final decision could be rendered by the Agency. The Agency adopted the Administrative Judge's decision on February 4, 1992. I had previously notified the Agency three times that the transcript was not in conformity with 29 CFR 1613.218 (h) as it was not verbatim and, prior to any final decision being rendered, a comparison should be made to

the original electronic recording taped at the hearing. The Agency delayed in responding to my request for the comparison until after my appeal time to EEOC had expired. The Agency made no comparison, stating that I had not given specific evidence that the transcript was defective enough to effect the outcome of the case in any material respect. However, the Agency also admitted that it had no copy of the audio electronic tape recording of the hearing as that was not part of the contract with the personnel hired. I attempted to obtain a duplicate copy of original audio electronic tape recording from the personnel hired by the Agency without any success. The person contracted to produce the transcripts is not cooperating and I can't get any

copies of the original recording. The enclosed statement of facts will demonstrate that I did not have concrete knowledge of incompetency of personnel hired by the Agency until March 31, 1992. This appeal is being filed eight days after documentation from the State of Illinois showed that fact. Copies of all relevant third party documentation will verify or demonstrate my request for this appeal under 29 CFR 1613.233 (c), as circumstances beyond my control existed in recognizing the incompetence of the Agency's hired personnel due to concealment and gathering the third party documentation to prove it.

Sincerely,

/s/ NATHANIEL WHITE
Nathaniel White,
Complainant, Pro Se